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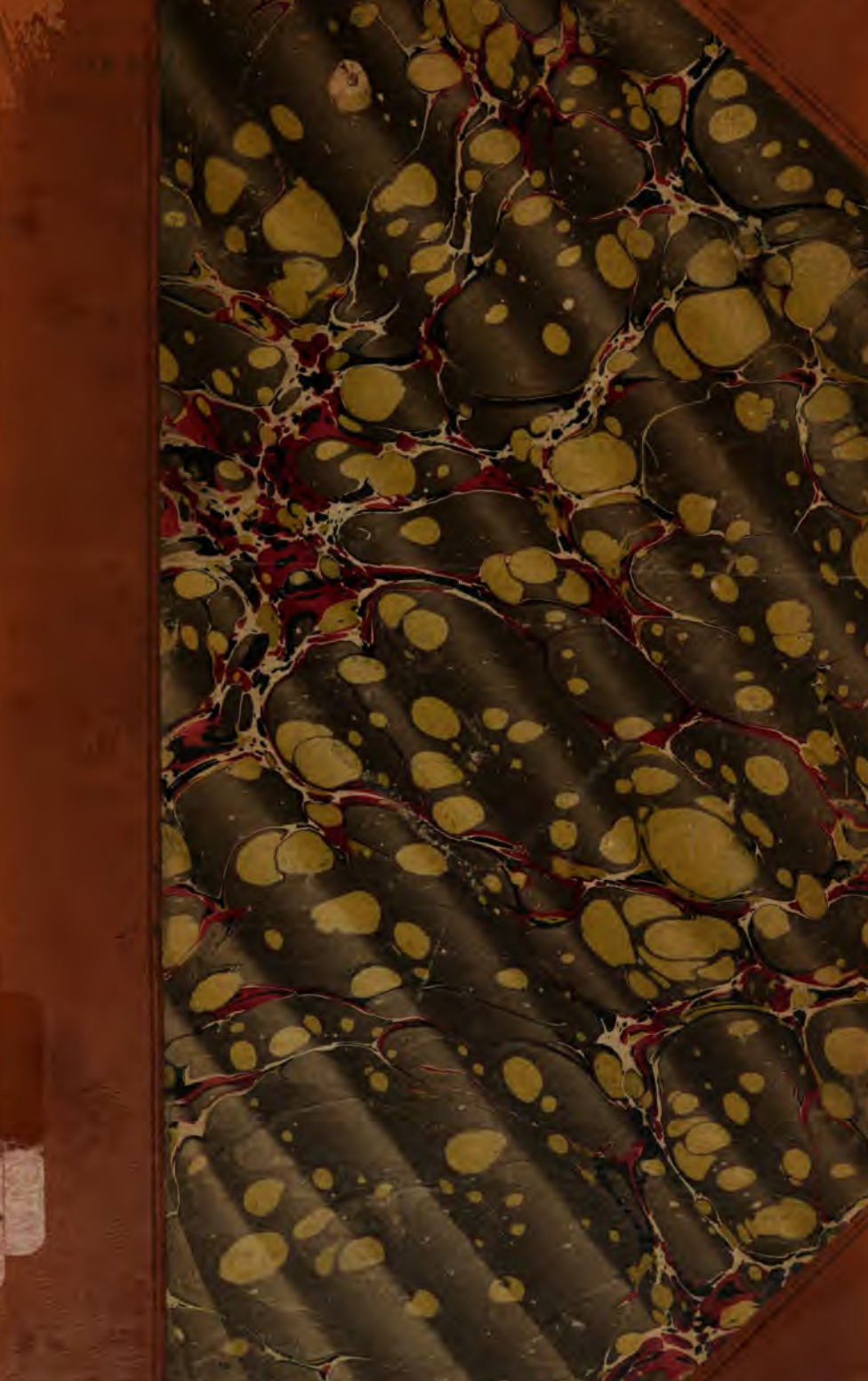
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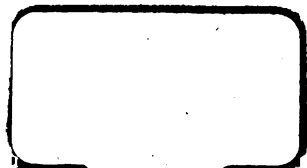
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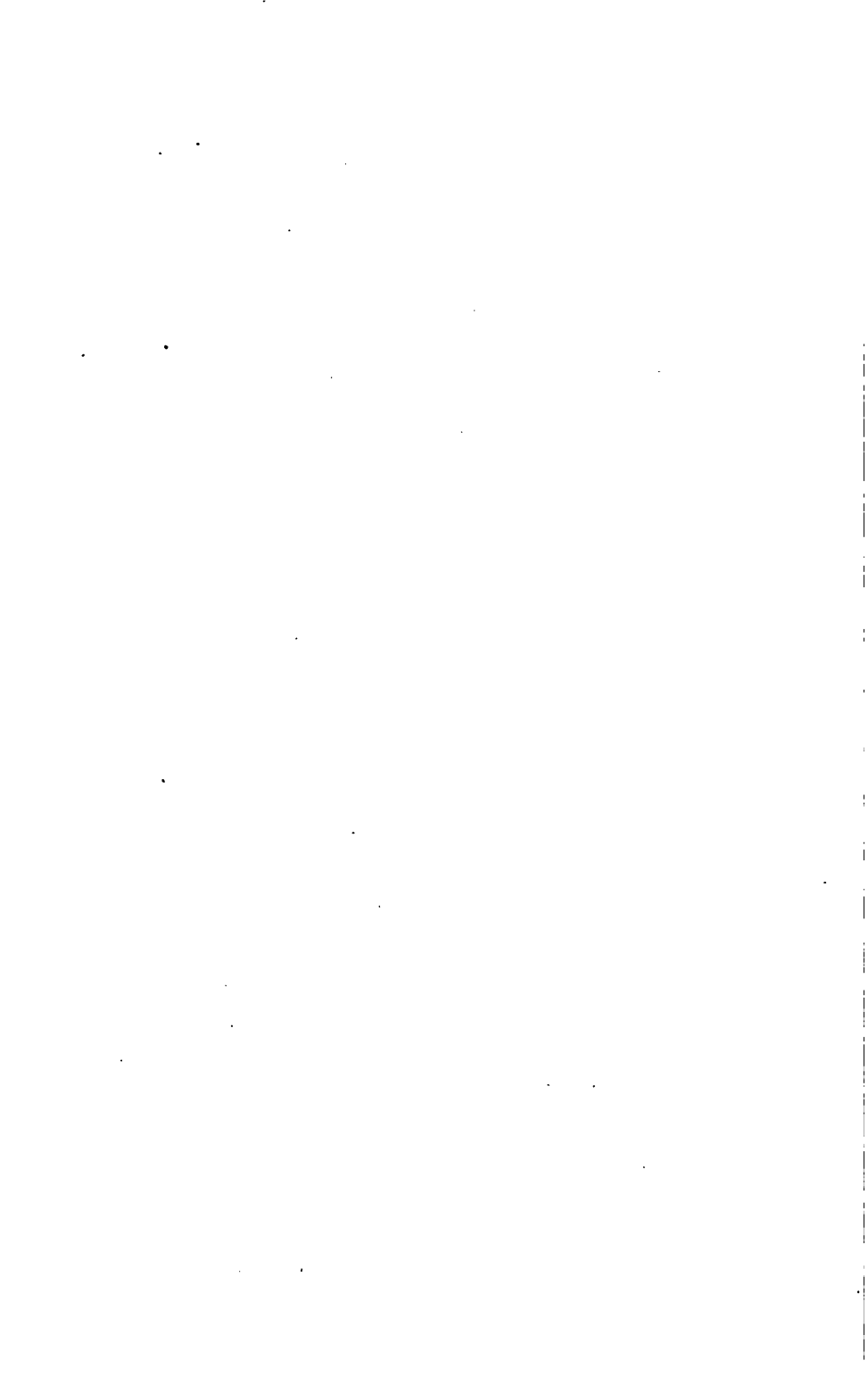
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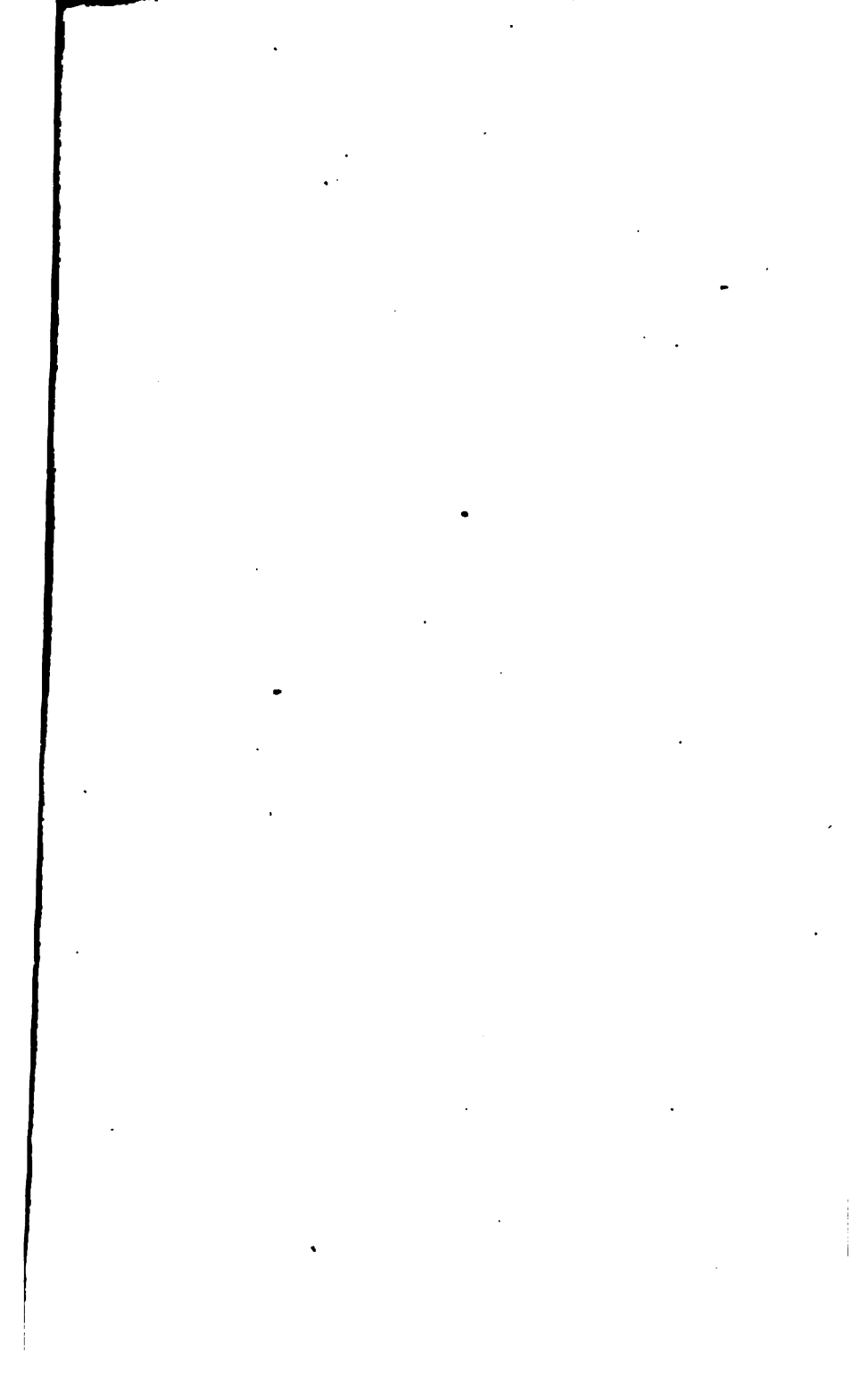




English Literature  
History









# THE LAW REVIEW.

VOL. IX.

LONDON :  
SPOTTISWOODES and SHAW,  
New-street-Square.

THE  
**LAW REVIEW,**

AND

**Quarterly Journal**

OF

**BRITISH AND FOREIGN JURISPRUDENCE.**

**VOL. IX.**

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**NOVEMBER, 1848. — FEBRUARY, 1849.**

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**LONDON :**  
**V. & R. STEVENS, & G. S. NORTON,**  
**BELL YARD, LINCOLN'S INN, AND 194. FLEET STREET.**

**1849.**

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THE  
LAW REVIEW.

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ART. I.—THE JUDGE-MASTER QUESTION.

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THE prospects of Chancery Reform begin to brighten — light at last appears on the horizon. We are getting in the right track — the true questions are now being raised, and will, at all events, be fully discussed; and materials for their proper settlement are fast accumulating. The machinery of the Court of Chancery must be adapted to the wants of the times. We must obtain a procedure which will really answer the purposes of the suitor; and although we should proceed cautiously, we must not hesitate in making great changes if they shall be found to be necessary. The time for large alterations has, in fact, arrived: the alternative now presented is the abolition of this Court — of a separate equitable jurisdiction in this country; for we do not shrink from saying, having long carefully watched the growing feeling on this subject, that the public are becoming so heartily sick and weary of this Court, that unless it be speedily and thoroughly

reformed, it will disappear. It was indeed an unseemly and dangerous spectacle to see the most eminent statesmen of this country holding up the first tribunal of the land to public execration during the whole of the last session of parliament; a reluctant assent to the justice of the complaints being at length wrung from the unwilling lips of the Lord Chancellor himself. The suitors fear this Court,—the Judges censure it—the practitioners, and even the officers of the Court, high and low, denounce its procedure. Surely then the most obstinate lover of things as they are will admit the necessity of its amendment.

Some of the documents at the head of this article furnish us with much information, by persons competent to give it, with respect to the monster grievance connected with the subject—the Master's Office—as to its expense—its delay—the practical extortion which there prevails, and as to the want of power in the Master, however he may desire it, to compel the parties to proceed. We have, at length, obtained one great means of assistance in our efforts to forward the necessary reform: we allude to the aid of the Masters themselves, and those officials connected with them. So far from there being any attempt to disguise or conceal the defects of the present system, it is from the mouths of some of these gentlemen, as witnesses before the Fees Committee, that we shall obtain its most severe and emphatic condemnation.

We must also notice that Mr. Farrer, one of the most able, experienced, and popular of the body of Masters, has conferred a great obligation on the profession, by giving to the world, at this particular time, a calm and lucid statement, full of practical information as to the duties and business transacted by the Master; in which he admits the necessity for great alterations, and points out where they may be made most advantageously. We do not agree in all his conclusions, as we shall hereafter show; but we fully recognise the value of his suggestions. In making this statement, Mr. Farrer's position must be remembered, and the caution and reserve which should properly accompany it. But we may say that it always gives us great pleasure when we thus obtain, as contributory to law amendment, the results of actual judicial

experience. We regret that the Judges so seldom contribute to this great work, for which they are so well fitted from their knowledge and ability, and for which they are, in our opinion, constitutionally responsible.<sup>1</sup>

We shall now proceed, at the risk of incurring a charge of surplusage, and needlessly labouring our case, to show, from sources the most competent to give correct and exact information, some of the evils which now exist in the Master's Office. To warrant the great alteration which we propose, it is our bounden duty to show that the procedure of this office is most heartily and universally condemned even by the officers who carry it into execution. Let us first call Mr. Pugh, the chief clerk of the late Sir G. Wilson, and now of Mr. Kindersley:—

"1304.<sup>2</sup> The expense of an inquiry before the Master is very great? — *Mr. Pugh: Yes; the chief expense of a Chancery suit is in the Master's Office.*

"1305. Has the Court any power to accelerate the business, or does it ever exercise any power to accelerate the business in the Master's Office, or to see that the parties shall go on with more expedition? — *No, it has no power; and there is no penalty for not proceeding.*

"1306. Has the Master himself any power of compelling the parties to go on with the suit more expeditiously? — *None.*

"1307. Then it is entirely dependent upon the solicitor whether he will go on with the suit expeditiously in the Master's Office? — *The only pressure under which the solicitor is put is, that the opposite party may ask the Master to let him in to conduct the cause, on the ground of the alleged indifference of the party prosecuting it. If they make out a satisfactory case, the Master is entitled, by the rules of the Court, to give the conduct of the suit to the party who makes the complaint, upon his establishing that complaint.*

"1308. Have you known that happen often? — *Very seldom;*

<sup>1</sup> We are glad to have the following confirmation of our opinion:—"My learned brother and myself, in common, I believe, with all the Judges now in India, fully recognise the duty incumbent on us of making the paths of justice as accessible as the nature of things and the powers granted to us by the law will permit." By Sir Erskine Perry, C. J., at Bombay, 29th May, 1848.

<sup>2</sup> Report, 1847.



applications are very frequent, but it generally happens that the application stimulates the other party to greater vigilance.”

“1302. Generally speaking, when children and married women are parties to a suit, it goes into the Master’s Office? — Yes, and when it arises under a will.

“1310. *Have not you found that when the solicitor chooses to throw impediments in the way, he may protract the investigation before the Master to a very great extent?* — *I think that an ingenious solicitor, who cavils at every thing, and excepts to every step which the Master may take, may delay the proceedings without end.*

“1311. You know that in many instances suits have been delayed in the Master’s Office a long period of time? — Yes.

“1312. What is the longest period that you can call to your recollection? — Inquiries have lasted six, seven, or eight years, which, without vexatious opposition, with proper vigilance on the part of the solicitor, might have been completed in six months.”

Surely this is as strong a statement as can well be imagined, coming, as it does, from unquestionable authority. Let us hear, further, what a respectable solicitor, Mr. B. M’Leod, says on the same subject: —

“1580. There is great delay, I believe, in the Master’s Office, is there not? — *Mr. M’Leod*: Very great indeed.

“1581. And consequent expense? — And consequent expense.

“1607. *Mr. B. Escott*: Can you account for these sort of extortions<sup>1</sup> [as to taking copies, &c.] being submitted to so long? — Yes, I can.

“1608. How? — *Because we cannot get our business done without it.*

“1609. So that you are obliged to submit to unjust taxation of money in order to get your business done? — *It is so.*”

We must next bring before our readers the grievance of the hourly warrant system, and with the hope that this may be forthwith and summarily abolished. It is quite cheering to see how the chief clerks give tongue at it. Hear again Mr. Pugh: —

“1297. Is there an hour for each attendance? — No, nor any thing like an hour; the confusion that is going on in the Master’s

<sup>1</sup> As to this, see the evidence of Mr. M’Leod, 8 L. R. p. 340. et seq.

Office would astonish any person. From the number of warrants granted, and the pressure of business, one party is always trenching upon the engagement of another. In settling a report the parties assemble, and the Master's clerk has his papers before him. There is always a certain time lost before they begin, and then a discussion takes place as to what they did upon the last occasion, when they left off; and more than half the time is gone before anything is done.

"1298. Do they remain out of the room till all the parties are ready, or can they get in? — They can always get in, because the clerk's room is open to every body, so that they come in directly.

"1299. Some warrants are attended before the Master, and some before the chief clerk? — A warrant attended before the Master is a much more solemn matter, because the Master will not allow himself to be interrupted. [?]

"1300. Then they are only shown in to the Master when they are all assembled in the clerk's room? — When they are assembled, and ready to go on.

"1301. Is there a considerable want of punctuality in the parties attending? — There is.

"1302. When before the Master, when their hour expires they retire? — Then they retire.

"1303. So that it may often happen, that when they ought to have attended for an hour, there has been only half the hour really expended? — Very often, particularly before the clerk; the warrants to settle reports are not often before the Master, they are before the clerk; and they never begin at the proper time. Probably the clerk is in the midst of settling another report nearly complete, with half a dozen parties round him, and he feels exceedingly unwilling, if half an hour will finish the business in hand, to begin a new matter upon which perhaps nothing important will be done. Therefore it constantly happens that the clerk puts off the parties himself."

Now see this confirmed by the solicitors: —

"1580.<sup>1</sup> Would not it be an advantage if the Judge were obliged, *de die in diem*, to follow out the examination instead of the present mode, in which you are often weeks and months in getting inquiries made before the Master? — *Mr. Gregory*: I think so, in all cases where you have all the evidence before the Court, which you afterwards have to use before the Master.

"1581. Are there not very great inconveniences from the

<sup>1</sup> First Report, 1848.

Master assigning an hour to hear you on different occasions, when, perhaps, an hour and a half, if followed up consecutively by the Judge, would decide the business? — It is competent now to the Master, and they do so frequently, to grant consecutive warrants.

"1582. Is not it the ordinary rule for the Master to fix how many cases he will hear in the course of the day, and when the hour comes and the other parties are waiting, is not he obliged to suspend that particular business? — Constantly.

"1583. Is not that a considerable interruption to business? — It is.

"1951.<sup>1</sup> Is there any thing else respecting the Master's Office which you wish to state? — *Mr. M'Leod*: I can state a cause of delay. In some of the Masters' Offices they have this practice; they refuse warrants which extend over the holidays; for instance, supposing the office closes from Monday to Monday, in some offices they will not issue a warrant on the Saturday returnable on the Tuesday; the effect of that is, that the Master and his clerks when the office opens, have nothing to do; there are three descriptions of warrants which the Master issues, warrants to proceed *de die in diem*, returnable one day for the next; warrants under the general practice of the Court, in which a clear day intervenes; and warrants under the Act of Parliament, in which two clear days intervene, therefore where the Master will not issue his warrants to extend over the holidays, he gets one, two, or three days' holiday in addition; that does not prevail in all the offices, but in some of them it is a practice which I think wholly unjustifiable, and causes very great delay."

This system of hourly warrants, so utterly indefensible, is surely doomed. It is rather strange that, with the strong opinions existing against it, the new Taxing Masters should have adopted this very system for the regulation of their business. It cannot be wondered at that it does not give satisfaction even in their hands.

"1679. *Chairman*: What is the cause of the delay in the Taxing Masters' Office? — *Mr. M'Leod*: The delay arises from the taxing officers not granting warrants before eleven nor after three, and they go with extreme slowness through the business.

"1684. Some of them, namely, four of them, are compensated officers besides having 2000*l.* a-year? — Yes, two are not.

"1690. Do I understand you that the hours of business are

<sup>1</sup> Report, 1847.

from eleven to three?—Generally so; the warrants issued at three extends to four; warrants made returnable earlier than eleven or later than three, are exceptions, and the instances very rare.

“1692. *Chairman*: How long does a warrant endure?—*For an hour. The reason why the bills are so long in taxing is, that we cannot get appointments; sometimes an appointment will extend over three weeks or a fortnight.*

“1698. *Mr. Henley*: With respect to the delay which you say takes place in the Master’s Office in taxing the bill, is there any occasion of the delay, except the shortness of the time which is given?—The delay arises from the difficulty of getting appointments, in consequence of the taxing officers being too few in number.

“1699. Are they too few in number, or do they give too small a number of hours?—I should say the taxing officers ought to sit, at least, from ten till five or six.”

So much for the officers of the Court. Now as to the solicitors themselves. That the fault is frequently with them is thus admitted by Mr. Gregory. The remarks of Mr. Farrer in extenuation (pp. 4, 5.), are well worthy of attention; but we have no doubt that cause for great blame does really exist.

“1646. There is great complaint made by the Masters at present, that they cannot induce the solicitors to go on with the work, and that a large portion of the delays which are complained of in the Masters’ Offices arises from this, that they have no means of compelling solicitors to go on with their work?—*Mr. Gregory*: I have no doubt that that is the case.

“1650. The result of that is, that if parties do not choose to proceed *for two or three years*, the Master cannot compel them; and it may create intervals, may it not, between the different parts of the same business?—Yes.

“1651. That is a great evil, is it not?—Yes; I do not see how that could be remedied, except by giving the Masters power to compel parties to proceed.

“1652. And then in the absence of parties?—He might proceed *ex parte*.<sup>1</sup>

<sup>1</sup> As to the difficulty of proceeding *ex parte*, see M Farrer’s remark, pp. 6, 7.

"1653. In many cases it would be difficult, and scarcely possible, to proceed *ex parte*; in cases, for instance, where it was upon a reference to the Master to know whether it was for the benefit of an infant that certain proceedings should be adopted?—Generally speaking, that is not the class of cases where the delay arises: I think those are prosecuted generally with great efficacy.

"1654. You suggest that the Master should have a compulsory power?—Yes; to fix a day. Which power he might exercise at his own discretion; he should have the power of adjourning the matter if he chose. I am afraid, practically speaking, that that is not attended to, though the Master does it. He asks, I believe, universally, when the parties will undertake to do so and so; ten days are named, and they go by, and perhaps ten days more.

"1655. *Mr. Hume*: Are there any means of protecting an individual whose suit ought to come on, against these delays; suppose them to be intentional on the part of the solicitor?—I do not think in general that they are intentional; they arise from the difficulty of obtaining evidence or information required; any intentional delay cannot be for the interest of the solicitor.

"1656. It appears that you have no means, then, of compelling a consecutive proceeding in a suit, until it is settled?—I think to a great extent it might be done. There is another thing, when you have to get evidence from parties, you cannot compel them to make affidavits; you have a great objection to bring them by subpoena, or to send out commissions to examine them, on account of the very heavy expense."

So far the solicitor. Now let us hear what *Mr. Farrer* says as to this:—

"As to delay, no one of the existing Orders, nor of the plans yet proposed, applies a sufficient remedy. The Order enabling the Master 'to fix times for proceeding' approaches it. If the Masters are considered to be responsible for the diligent working of decrees, &c., the authority thereby vested in them must be enlarged; a general power must be given to them to control or superintend the proceedings; they must be authorised to direct warrants to be taken for the attendance of all parties, or any one party, for the purpose of inquiring into causes of delay, where proceedings are dilatory, and directing the time within which the reference shall be worked, so that the Master may either keep the parties active, or ascertain the causes of delay and record them. Under existing regulations the Masters make an annual return of

all causes and matters in their respective offices, showing the state of proceeding upon references to them; but very little if any benefit results from these returns. Although it may appear, that in certain causes no proceedings for a long time have been taken, there the matter ends; it is the duty of no one, it is not within the authority of any one, unless of the Judges of the Superior Courts, to inquire into the causes of the delay.

“Great objection will justly be made to such interference as is here suggested with the principle ‘that the parties know best how to conduct their own causes;’ but the interference is suggested upon no other ground than that it appears to be the only means by which the public can be satisfied that the alleged delay either does not exist, or, if it does exist, that the cause is not to be found in any dilatoriness on the part of the Master; to which may be added the probability, that if such power of control or superintendence be given to the Masters, the parties themselves will be influenced by it, and will be stimulated to diligence in prosecuting references in their Offices, and the exercise of any power that may be vested in the Master will probably be but little called for in practice.” (*Observations*, pp. 27, 28.)

Having thus proved, from unquestionable authority, the great evils that exist, and that there is no sufficient power for their remedy, we proceed to consider the plans which have been recently proposed with this view.

We have for some time devoted considerable space to this subject. In May 1847 (6 L. R. 122.) we opened it and stated how the main questions then stood, giving a short history of the more recent attempts at Chancery Reform, and we showed that all plans of reform ranged themselves under one of the following heads:—I. Plans which go to the improvement of the Master’s Office. II. Plans which transfer the duties of the Master, either wholly or partially, to some other judicial power; and we then briefly noticed what had been done under both of these heads. It is to be observed, that one of the suggestions under the former head, the abolishing the attendance in the public office, has been attended to.<sup>1</sup> Since this period we have laid before our readers various reports, papers, and articles on this subject, and have en-

<sup>1</sup> 10 & 11 Vict. c. 97.

deavoured (keeping up the same division) to give some materials for forming an opinion. The Report of the Equity Committee of the Law Amendment Society, on the Master's Office (6 L. R. 308.); the Proposed Report on the extended reference (6 L. R. 315.); the Report actually adopted on such reference (7 L. R. 55.); and the Report on the Management of Property intrusted to the Court of Chancery (8 L. R. 87.): these reports and papers all throw light on the important question, whether it be better to make the Chancery Judges act as Masters, or whether it be better in some cases to clothe the Masters with the authority of Judges. This question is now brought prominently forward by Mr. Farrer in his valuable pamphlet, more especially in connection with two of the reports to which we have alluded, that called the Proposed Report (6 L. R. 315.) and the Report actually adopted (7 L. R. 55.). There is no more important subject within the range of juridical controversy.

Let us again briefly state the nature of the two propositions. The one gives the Master in certain cases an original jurisdiction, allowing the parties to commence proceedings in the Master's Office under certain regulations. The other substitutes the Judge for the Master, leaving the staff and machinery of the Master untouched, but gives the Judge the same authority over and connection with them, as the Master now has. It would in no respect diminish any power or authority now enjoyed by the Master. "The Master," says Mr. Farrer, p. 127 n. "has larger powers of inquiry than any other judicial officer. He can proceed upon affidavits, examination of witnesses by written interrogatories or *vivâ voce*; he can examine parties to the record upon written interrogatories, and compel them to produce books, papers, &c. relating to the matters before him." These powers it is proposed, of course, to continue to the Judge-Master. Both plans resemble each other to a great extent. They assume, so far as they go, that one judicial person, properly assisted, is to have the direction and disposal of the matter brought before him, subject to appeal. The only difference is, that that person is to be in the one case a Master, and in the other a Judge.



But it is only to a certain portion of the business of the Court of Chancery, which is considered to be of a more routine or simple nature, that it is by some proposed to apply this process. In the more important business in which the great delay and difficulty exist, it is by them still considered desirable to continue the old division of labour; and to use the words of Mr. Farrer, to allow "the Judge to make the decree containing all necessary orders and directions, and the Master to execute them." (Page 19.)

In simple and routine matters, then, it would seem to be admitted by all to be better to employ only one person with a competent staff, but in more difficult matters some say two persons with distinct staffs, who shall not necessarily communicate with each other, are better.

The following matters might, in Mr. Farrer's opinion, be properly disposed of by the sole authority of the Master, an original jurisdiction being given to him for that purpose.

"The general principle of the Courts, with reference to the Masters' Offices is, that the Master shall only make the inquiries, take the accounts, and execute the directions contained in their decrees and orders, and that no proceedings shall originate in the Master's Office. This principle, as appears from a former part of these observations, has been to a certain extent relaxed, but still it prevails, and is, in the opinion of many experienced persons, productive of unnecessary delay and expense. After a decree and reference to the Master it often becomes necessary or expedient

"To appoint a new guardian or guardians;

"To increase maintenance;

"To appoint a new receiver, consignee or manager;

"To appoint new trustees;

"To bring or defend actions;

"To repair farm and other houses, &c., or erect new buildings;

"To drain or make other permanent improvements;

"To cut down timber and thin plantations;

"To bore for, open, and work mines;

"To enter into contracts for purchase or sale of property;

"To make payments for the advancement in life of wards of the Court, by the purchase of commissions in the army, fitting out for the navy or sea service, providing apprentice fees, &c. &c.;

“ To approve marriages of wards of Court and proposals for settlement.

“ In all these and other cases, it is necessary to present a petition to the Court supported by affidavit, upon which the Court makes an order of reference to the Master, nearly always, as a matter of course ; the order is drawn up and left in the Master's Office, a warrant is taken out to obtain the Master's directions as to proceeding on the order, the Master directs a state of facts supported by evidence to be left, which being left, the Master proceeds, and having allowed or disallowed the proposal, a report is made, and this goes before the Court for confirmation or by way of appeal.

“ Many, well acquainted with the practice of the Court, think that applications to the Court in such cases are unnecessary, and consequently without being of any benefit to the suitors are productive of needless delay and costs ; we agree in that opinion, and join with those who suggest, that in the above-mentioned and similar cases the proceedings should commence by leaving states of facts, proposals, &c., in the Master's Office, without a previous petition to and order of reference by the Court. If the Master should consider the state of facts and proposal proper, he would allow it, and make his report to the Court, stating his opinion, and submitting it to the Court ; if he should think the proposal improper, then he would disallow it. In either case any party might go to the Court if dissatisfied with the Master's decision. This would very rarely occur. This change would effect, undoubtedly, some saving in time and a large saving in costs. If it be objected, that the Court ought in the first instance to judge of the propriety of the inquiry and proposal — that the Court is properly jealous of any proceedings without its previous sanction and direction — the answer is, that this exercise of authority by the Court is unnecessary, that it is in fact frequently nominal and formal, and that this jealousy is now misplaced and inconsistent with the responsible duties which the Masters perform, and with the confidence which the Courts practically place in them.<sup>1</sup>

“ There may also be cases in which the proceeding (there being no previous decree) might commence in the Master's Office ; for

<sup>1</sup> “ In some few instances, special orders have been made by the Court, giving leave to lay proposals in the first instance before the Master, such as proposals for cutting timber and bringing actions. In cases of commutation of tithes, a general order has been made under which the proceeding is directed to begin in the Master's Office without a previous petition to the Court — proposals for leases also commence at once before the Master.” — *Mr. Farrer's note.*

instance, on petitions to appoint guardians and allow maintenance without suit — on inquiries, whether A. B. is an infant trustee or mortgagee — whether C. D. is a trustee or mortgagee within the meaning of the statute, &c., and whether he is within the jurisdiction ; in this class of cases the Courts make references, as almost of course, to the Masters, not to find and report facts only, but to report whether A. B. and C. D. are trustees within the meaning of the statutes. In their reports the Masters having stated the facts, necessarily, in obeying the order, certify their opinion upon the law. If the Master simply stated the facts without his finding, that is, his opinion upon the law, the report would be sent back to him with an order to review, in other words, to report his opinion.

“ Again, an order might be made giving the Master leave, in all cases, to state special circumstances in his report ; he cannot do so now without leave of the Court given by the decree or order.” (Pp. 24—27.)

In the large and varied class of the business of the Court of Chancery here adverted to, Mr. Farrer thinks that an original jurisdiction might advantageously be given to the Master ; and it is to be observed, he not only specifies certain matters in which it should be thus conferred, but mentions generally, (p. 25.) “ other cases,” and “ similar cases,” (p. 26.) in which it might be given. In all these matters then we are agreed, that it is most to the advantage of the suitor to employ one person only, properly assisted, who shall have complete control over the matter before him, subject only to appeal. Nor can it be of any great importance whether this person is a Master or a Judge :

“ A saint in crape is twice a saint in lawn ; ”

and a Judge must be taken to be better than a Master ; but so far as judicial procedure goes, assuming that all Masters as well as all Judges are skilled and legally educated men that is not of vital importance.

Admitting then that certain matters are best disposed of by one man, Mr. Farrer does not allow that this should be the universal practice of the Court, but thinks that in others the old division should be continued. For this he gives the following reasons.

“ No Judge,” he says, “ however accomplished, acting as Master, could give such satisfaction as to prevent appeals. Consider a

report made by any one of the Judges of the Rolls and Vice-Chancellors' Courts acting as Judge-Master. Would appeal be less likely from his findings or decisions, when embodied in a report, than from the findings of a report made, say by the present senior or junior Master? It is obvious to every man acquainted with the feelings of litigants, that upon all arguable questions they will never be satisfied with less than one solemn argument in open Court, and judgment by one of the superior Judges. The consequence would be, that in those cases in which now the appeal is from the Master to one of the Judges of the Courts before mentioned, the appeal would be from the Judge-Master to the Lord Chancellor." (P. 20.)

Now we will assume (although we think it might reasonably be disputed) that the same number of appeals would arise in the one case as the other; yet it has been shown in the Report to which Mr. Farrer refers<sup>1</sup>, how small in number are the appeals from the Master at present, and as small of course would be the number of appeals from the Judge-Masters. But in the present arrangement of business, the great and just complaint is, that whether there is an appeal or not, *two* judicial persons are employed, with much additional attendant delay and expense, which might be avoided by employing only one such person. With respect to the "solemn argument in open Court, and judgment by one of the superior Judges," of which Mr. Farrer appears to think the plan would deprive the suitor, this was never intended; it having always been proposed that the Judge should hear the cause in open Court, and then as Master work it out, assisted by the Master's staff.

Entering into some of the details of the plan, Mr. Farrer questions that part of it which proposes that the sale of estates might be performed by an officer of inferior station to the Master. Mr. Farrer thinks that this would not be advisable (p. 21. n.), but, in the same page, admits that the sale of estates is now, in fact, made before the Master's chief clerk, having, it is true, the advantage of immediate communication with the Master himself; but then it is proposed to place the Judge in this respect in exactly the same position

<sup>1</sup> See 7 L. R. 75.

as the Master. So with regard to receivers of infant estates, who, Mr. Farrer says, "pass their accounts before the chief clerk, yet, where difficulties upon items arise, he consults with the Master upon them or makes queries, and the parties attend the Master for his decision." (P. 22.) But all this could be done by the Judge. If it were considered advisable to continue this portion of the duties of the Court of Chancery, distributed through many offices, instead of being given to one, the Judge-Master would be as competent to attend to it and direct it as the present Master.

Let us now turn to the evidence contained in the Report on Fees, where we shall find some further information from competent persons on the point of employing the Judge to dispose of the whole of any matter referred to him from beginning to end; the advantages of which are well stated in some of the questions, more especially those of the present Solicitor-General (the chairman of the committee), and Mr. Hume. Mr. Gregory, the eminent solicitor, is asked by Sir J. Romilly whether the working out his own decrees by the Judge —

"Would put an end to this inconvenience, that there would be no difficulty in understanding with what view the reference was directed; at present considerable time is occupied by the Master in the parties trying to instil into his mind, the particular view which the Court had in directing the reference? — Yes.

"1587. That would be avoided in the best possible manner, because the Court would know exactly what object it had in directing the reference? — Certainly.

"1588. Would not it produce this advantage also, that the Court would, in a great many instances, decide matters which it now refers to the Master, when the Court has, in fact, before it the same evidence upon which the Master will have to decide? — *I have no doubt of it.* The practice, doubtless, arose originally from the great pressure upon the judges.

"1593. *Chairman*: Supposing all these things, which are now done by the Master alone, were directed to be done by a Judge in Chambers, do you think it would not be possible for him to do those parts of the business? — The great majority of them, but not matters of account; for instance, the business of passing vouchers, and such details as that.

"1594. Vouchers are not passed before the Master, they are passed before his clerk?—They are supposed to be before the Master.

"1595. *The suggestion made by the former question is not to put an end to the Master's clerks, and all those offices which are done by them, but that they should be attached to the Judge of the Court instead of to the Master, and that the Judge of the Court should now do those duties of a judicial nature, which are performed by the Master?*—Certainly; I think that would be a great improvement.

"1635. The question put to you by Mr. Hume was, 'Do you think the Masters' office could be abolished altogether if additional judges were appointed, who, after hearing a suit in open Court, should proceed in Chambers to take account, as is now done by the Masters?'—I have considered that question, and it seems to me to involve so great and fundamental a change in the whole constitution of the Court, that I think it beyond my means of forming a judgment to pronounce an opinion upon it. I think, however, that there are many alterations in that respect, that might be beneficially introduced; for instance, the separation of those parts which you may term the judicial parts, and those which I should distinguish as the ministerial parts of the decree; thus, wherever there was a question of fact as to which the evidence was or might be laid before the Court, or of law to be decided, *I think that the Court might very well dispose of that*, but if it was a question involving matters of account, I should say that that would be much better administered *where it is*.<sup>1</sup>

"1642. Would it also be an improvement if the business were continued and completed as far as it could be?—Yes, I think it would."

The same subject is thus continued, with another witness, Mr. Neate:—

"1698. Do you think that that mode, by which one individual would hear the cause *ab initio* to its determination, would not save time and expense?—From the very nature of the inquiries involved in a suit, it is impossible, in my opinion, for a Judge, whether a Master in Chancery (for I consider him a Judge) or

<sup>1</sup> It should be borne in mind that *where it is* means by the chief clerk communicating, if necessary, with the Master. The proposed plan would leave this matter *where it is*, only enabling the chief clerk to communicate with the Judge instead of the Master.

any other person, to decide, except upon sufficient materials, and a suit involves a great number.

"1699. What is there to prevent a Judge obtaining the same materials to enable him to decide as the Master does?—Nothing, except that I should consider him no more than a Master. I apprehend that a Master now has very much the same power that you are suggesting should be given to a distinct set of Judges.

"1700. I am supposing a cause heard in Court. The practice now is that the Judge decides that certain portions of the suit are to be referred to the Master in Chancery, and after the Master in Chancery has decided upon them, the matter comes before the Judge, and then he decides the suit; my question alludes to the propriety of his hearing the cause from the first, and making the same inquiries in his office as the Masters in Chancery now do; and I ask you whether the person who hears the suit is not equally qualified, if he have the same assistance from clerks, to go from the Bench to his Chamber, and do that which is now done by the Master and his clerks?—I think that would not be a good division of labour. For the purposes of determining the great and leading principles of law in a suit, we require the highest talent that this country affords; I think that such talent would be misapplied if applied to the minor details of a cause.

"1701. *You think then that a man of talent is not capable of mastering minor details?*—Certainly, he is very capable of mastering minor details; but I think that his talent would be wasted upon those minor details.

"1702. *Can any talent be wasted if justice should be facilitated by that means, and a cause brought to a more early determination, and at less expense?*—I think that the hearing of the cause would assist him very slightly in the inquiries which he would have afterwards to make through the assistance of his clerks, and that the course proposed would neither prevent delay nor diminish the expense.

"1703. Then why bring it at all into the first court; why not go to the Master at once, who might hear it, and decide it?—The mode adopted now is, *not to decide upon the question in the first instance*, but upon the frame of the pleadings, to direct certain inquiries to the Master; and when the Master has answered those inquiries, and arrived at those results, which are necessary to arrive at before the Court can know what questions it has to decide, it is then that the Court is called upon to decide the questions which arise."



Mr. Neate has correctly stated the present practice, but whether it be advisable to continue this practice is another question. At present the first hearing of a cause is admitted to be on imperfect materials — a sort of *feeler* to see how the wind lies. Surely if delay and expense were the express object of the parties, no better or surer plan for incurring both could be devised. But can it be satisfactory to the Judge to decide on a case but half got up? Let us see what Master Farrer says as to this: —

“Amongst the important subjects handled by ‘the Proposed Report,’ there is one that is deserving of particular attention, namely, the compelling parties to prove their case *by evidence at the hearing*. Perhaps ‘the Proposed Report’ applies this to too many cases, for instance, to proof of title; but there is no doubt that many references to the Masters would be rendered unnecessary *if the parties adhered to the old rule of going fully into evidence before the hearing*. In some cases, too, in which the evidence is only defective, the proceeding might be allowed to stand over for an affidavit or other evidence, by which the proof might be perfected, and the Court enabled to make orders *without reference to the Master*.” (P. 24.)

The present system favours carelessness, to say nothing of intentional delay. If a proof of any kind fails at the hearing, it can be supplied before the Master; and if not there at one time, it may be produced at another.<sup>1</sup> But if the parties suffered as at common law for want of producing the proper evidence at the proper time, say at the first hearing, if it were shown to be practicable to produce it, there would be an end of the present slovenly practice, of which Mr. Neate appears to approve. If the whole of a suit were confided to

<sup>1</sup> “Indeed,” says Mr. Farrer, “it has become a common practice to leave a state of facts in the office without evidence, and then to attend for the purpose of obtaining (as it is expressed) the Master’s view or opinion of the evidence he will require. The Master might (perhaps ought to) refuse to proceed, and tell the parties, ‘It is your duty to make your case perfect; my duty is to decide upon your case when so perfected; it is not my duty to advise you upon evidence.’ The parties say they are quite aware of that; but the Master’s general view would be a great accommodation to them; probably save time and expense. The Master gives way under protest that if, when the case comes before him, he should require further evidence, it must not be said that they had followed his opinions: thus the Master becomes a party to ‘instructing the case.’” (P. 15.)

one man it would be obviously his interest to decide as much, not as little as possible, in the first instance; and to insist that the evidence and materials for doing this should be as perfect as possible at the first hearing. If this were done, we believe that, in very many causes, the first hearing would be also the last; and, to use Mr. Farrer's words, the Court would be "enabled to make orders without referring to the Master." "Reform of the loose manner of pleading and giving evidence lies at the root of any real improvement in the Master's Office." (P. 17.) This is Mr. Farrer's very forcible conclusion.

We now come to what we consider the most important portion of the evidence on this point. We have hitherto had the opinions and suggestions of an eminent judicial person, and of eminent barristers and solicitors, on this interesting question. We shall now give that of an eminent Equity Judge, who not only thinks the plan worthy of trial, but is himself willing to begin the experiment: we allude to the evidence of Lord Langdale, to other portions of which, almost of equal value, we have recently had occasion to advert.

"1485. Has your Lordship considered whether any change could be made in the Master's Office, either by reducing the number of Masters altogether and appointing one or two, or whatever number of Judges additional, to sit and hear any case brought before them, and then proceed afterwards, off the Bench, to do the duties which now devolve on the Masters of Chancery? — I do not think it is impossible; but the arrangement of the Master's Office is, I conceive, one of the most difficult subjects to be treated. It has very often occurred to me that several different reforms might be effected, and it may be that something of the sort suggested might be useful. I am not sure that there are not more Masters than are needed, but I am not fully prepared to recommend a considerable reduction. *I incline to think that a Judge sitting out of Court, and without the attendance of counsel, might do several things which would prevent a good deal of expense in the Master's Office; and as far as I am concerned, I have been and am perfectly ready to make the experiment.*<sup>1</sup>

<sup>1</sup> It would seem that his Lordship would have power to do this of his own authority, for what the officer of the Court may do the Judge may do. See *Collins v. Aron*, 4 Bingh. N. C. 233. 235.; nor would there be, in fact, any great departure from the present practice, for the Court frequently will, to

"1486. At present, is it not the practice of the Judge after hearing a cause to refer it to a Master in Chancery? — Yes.

"1487. Is not the Master obliged to lose a portion of time to become acquainted with the case, and does not that tend to prolong the examination more than is required? — *It must be so to some extent.* I do not know how you can avoid it. In old time, perhaps, some Masters were always in Court when the Chancellor was in Court, heard the causes, and obtained all the knowledge that could be obtained by sittings there with the Judge; and at the end of the day those cases upon which it became necessary to make further inquiries, went to the Master who had heard the case in Court; in that way he might have become acquainted with the subject; but if so, it was by sitting and employing his time in Court; and I suppose that he must have occupied more time in that way than he does now in looking over the decree, and considering what is to be done upon it. It may, perhaps, be truly said that the Master is placed at a greater distance from the Court, and with less convenient access to the Judge than is expedient: to communicate on the subject of references only by reports, is a very expensive and dilatory mode, and I should be glad if some easier method could be provided in cases which might safely admit of it.

"1491. Does not your Lordship consider it, looking to the magnitude of business done in the Master's Office, one of the most important points to be attended to without delay? — I do."

We have now only one word to add on this part of the subject. With the least possible delay this plan should be tried. Let Lord Langdale's offer be accepted<sup>1</sup>, or create a Judge for the purpose. Take any of the Masters who may be thought the best qualified — say those named by Mr. Farrer, the present senior or junior Master. Surely there is enough evidence in favour of the plan to render a fair trial a proper experiment. The present procedure may remain in other respects unaltered. Let the new system of procedure be tried together with the old; abolish nothing until the new plan has been proved for a sufficient period. But surely it is no unreasonable demand that the suitors of the Court of Chancery should have the option of trying a mode of procedure

save expense, perform the work of a master, as perusing a conveyance. See 3 Railway Cases, 135.

<sup>1</sup> The late Master Lynch's staff are yet to be had, as we presume. See 10 & 11 Vict. cc. 60. s. 3. and 97. s. 7.

which so many competent persons think would be the only satisfactory remedy for their grievances.

It is proper to observe that by the stat. 11 & 12 Vict. c. 45. the legislature has made an important step, to some extent at all events, in the right direction. By this act, on the *petition* to the Lord Chancellor or the Master of the Rolls of any member or other person liable to contribute to the debts or losses of an insolvent joint-stock company, the Court may make an order for dissolving and winding up the affairs of a company; and refer it by such order to one of the Masters for this purpose: not only are bills and answers dispensed with, but all persons interested in the suit are represented in the first instance by an official manager: and the Master is to have full power and control over the matter, subject to appeal.<sup>1</sup>

We believe that the plan to which we have called attention is the most fitting for the disposal of the business of the Court of Chancery; but, in connection with it, other suggestions have been made which are not at all incompatible with its adoption.

Mr. Roundell Palmer (1677.) asks Mr. Gregory a question which involves an extensive change in procedure, which has been already before our readers.<sup>2</sup>

“1677. Has it ever occurred to you to consider whether a general power might not usefully be given to entertain any class of suit at the option of the suitor, by petition in the first instance? — I think that would be extremely useful.

“1678. In all cases in which parties were willing to have a question tried, so that it would be a very great saving of time and expense? — Certainly.

“1679. And probably the most economical and extensive reform that could be introduced into the Court? — I know of no one that would go so radically to meet the difficulty at present.”

Mr. S. Wortley makes another suggestion: —

“1680. As to the Master's Office, and with regard to the deficiency in the numbers required, has it ever been considered

<sup>1</sup> A bill was also introduced by the Government at the close of last session making some alteration in the Chancery offices; but as it was almost immediately withdrawn, we need not further allude to it.

<sup>2</sup> See vol. viii. p. 406.

whether that office could not be made available as an arbitration court, to some extent; to give the parties the option of attending on the Master, the arbitrator, to settle the whole cause between them, without being put to the expense of a private arbitration?<sup>1</sup> — I am not aware that that has ever entered into consideration; I think it might very easily be made useful.

“1681. For instance, I mean in a case of a complicated nature, involving heavy accounts referred to the Master, if the parties agreed to convert him into an arbitrator to settle all matters in difference between them? — Yes; and make it equal to a judicial determination.

“1683. And at the same time it should be the duty of the Master to undertake the arbitration without any additional remuneration? — Yes.”

Inquiry, we rejoice to find, is at last taking the right direction. How can the suitor be benefited? how can the road to justice be made easier and safer? These are the questions to which we are now endeavouring to obtain a satisfactory answer: and what is, perhaps, still better, the profession are beginning to find out that in endeavouring to solve them, they are but promoting their true interests.

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## ART. II. — INTERNATIONAL LAW.

### No. I.

It is rather singular that the English people, or that portion of the population who have been legislators, or who have practised the art or cultivated the science of law, while they made truly great and successful exertions for the establishment and improvement of their internal institutions, their

<sup>1</sup> This duty he performs already to a certain extent. Mr. Farrer says, “He (the Master) is a *quasi* arbitrator or referee. When it is thought advisable to compromise a cause to which infants and married women are parties, and terms of compromise have been agreed upon by all parties competent to bind themselves, it is referred to the Master to report whether the compromise is fair and proper, and for the benefit of the parties, not *sui juris*, and whether the same, with any and what variations, should be adopted.” (*Observations*, &c., p. 11.)

public or constitutional law, and their private civil, and criminal law for the administration of justice among individuals, should comparatively have paid so little attention to the Law of Nations, or what has been recently denominated International Law, embracing the external juridical relations, the reciprocal legal rights and obligations of separate independent states.

In their public or constitutional law, the English people appear to have hitherto excelled all the other nations of modern Europe; and are justly entitled to be proud, especially in the present times, of their constitution, which, whether it be termed a limited monarchy or an aristocratic republic, exhibits a system of regulated liberty, reared on a popular basis, and firm in the steady attachment of the great body of the people; and, though defective in many respects, as all human institutions have been, and seem destined to be, yet possessing in itself the means of correcting abuses, and of self-improvement.

Whether the English people have been equally successful in the formation of their criminal and private civil law, is perhaps a more doubtful question. Some eminently learned and able foreigners, who on other occasions have shown their impartiality and discernment, have remarked that England is "*fière de ses vieilles coutumes, et dédaigneuse de toute forme étrangère*;" and with regard to English lawyers, that "*la loi n'est pour eux, qu'une profession*." But without stopping here to inquire, whether there be any truth in such remarks, the great attention paid by the English people to their internal criminal law, and private civil jurisprudence, is sufficiently apparent from the voluminous statutes enacted from time to time by the legislature, and from the gradual formation of their now very extensive and complicated systems of common law and equity; in the construction of which the English Judges and lawyers adopted a different, and perhaps more independent course, than that pursued by the Continental nations, and rejecting, from an early period, (shall we say from the fifteenth century?) the aid of Roman experience, as exhibited in the remains of the works of the unquestionably great lawyers of that wonderful people, resolved of themselves to evolve and deduce from the juridical experience of

the nation itself, the rules and principles of its internal jurisprudence.

To the devotion of such high talents and acute discernment, and of so much learning and industry to the formation, not merely of the constitutional law, but also of the systems of common law and equity, the omission and neglect of the English lawyers to cultivate international law, as a science, (as we shall see more fully in the sequel), forms a striking contrast. It does not appear that any systematic course of preparatory education was ever either provided by the state, or even required by Government, for the individuals who were to be employed to carry on the international and diplomatic agency and business of the English or British people. And to these causes, perhaps, are to be attributed, as consequences, the fact of England having had so few able negotiators, and the trite, though perhaps too true, observation, that Britain has frequently lost by the pen, what she had gained by the sword; or lost, by her unskilful negotiation, advantages which she had fairly and honourably acquired in the course of her zealous exertions for the maintenance of the independence of nations, and in virtue of her military and naval skill and prowess; thus exhibiting an example of proud disinterestedness, not called for even as a moral or ethical duty, and not perhaps consistent with practical wisdom, or the general interests of mankind.<sup>1</sup>

In these circumstances it may not, perhaps, be unacceptable to a portion of our readers, that we should occasionally, in a few successive articles, take a cursory view of international law generally,—noticing the mode of its cultivation, tracing its origin and development, and endeavouring to ascertain its basis and fundamental principles, contemplating it in its two great component parts—common consuetudinary law, and conventional law, marking their characteristic and distinctive attributes. In these discussions we shall, of course, reject all legal fictions—all suppositions of social contracts, which never did, nor perhaps could, take place, and other

<sup>1</sup> What sacrifices were uselessly made by Great Britain at the General Peace of 1815; such as the cession of Java to the Dutch!

such hypothetical theories; and we shall endeavour to proceed solely upon observation and experience, adhering to that mode of inductive reasoning, which has been so successfully employed in the material sciences, such as mechanics, astronomy, and chemistry. Some time ago<sup>1</sup>, we devoted a few articles to what has lately been denominated *Private International Law*—the law of nations in their private or individual intercourse—stating our objections to the views entertained by many of the writers on the *Conflictus Legum*, and suggesting views, which we deemed more correct. What is now proposed, is to contemplate generally the reciprocal rights and obligations of nations, in their collective or corporate capacity, and in their more public intercourse, forming what has been called by the French, “*Droit Public Externe*.”

### I. *Of the Cultivation of International Law generally.*

The earliest attempts, in modern times, to discuss scientifically the Law of Nature and Nations, appear to have been made towards the close of what are called the Middle Ages, and are to be found in the writings of certain Italian and Spanish theologians, such as Vasquez and Suarez. But for an account of these authors, which is now merely a matter of curiosity, and for an interesting view of the leading causes, which concurred in modifying and improving the Law of Nations in Modern Europe, we may refer the English reader to Mr. Plumer Ward's “*History of the Law of Nations prior to the Age of Grotius*,” published in 1795.<sup>2</sup>

<sup>1</sup> See 4 L. R. 318., 6 L. R. 56.

<sup>2</sup> Of this accomplished author a recent writer on International Law remarks, “While it certainly is not to be regretted, that Mr. Ward should, in the more advanced period of his life, have devoted his leisure to that lighter species of literature in which he has so delighted the more polished circles of English society, the student of International Law may be permitted to wish, that he had also found leisure to render more perfect his juvenile historical work; and that, instead of only coming forward, no doubt most opportunely, with detached essays, in vindication of the just claims of his country, on occasions when they were assailed, he had erected a more complete and permanent monument to his own fame, by presenting the world with a scientifically digested book of International Law, in both peace and war.”



Of Grotius, the celebrated Father of the Law of Nations, as he is usually called, it would here be superfluous to say anything, after the able and full discussion of the merits of that illustrious man, and of the influence his writings had upon the literature of Modern Europe, with which Mr. Hallam, some years ago, favoured the British public.

Pufendorff, it is well known, followed Grotius; and his writings also had great influence on the age in which he lived. But they did not tend much to promote the advancement of the Law of Nations, to which he denied the rank of a separate science; including it, in a vague and indefinite manner, under the general morality, or ethics, of individuals and nations. This erroneous view was corrected by Rachel in the 17th century; but Christian Thomasius having adopted the view of Pufendorff, by his talents and learning rendered it triumphant for a time in Germany; and it was not till the 18th century, that a more precise and correct notion of International Law came to be generally entertained.

Leibnitz, among the multifarious labours of his comprehensive genius, besides suggesting the great advantage of preserving a record, and of making collections, from time to time, of the Treaties concluded between the different European nations, and of other state or diplomatic documents, and setting an example in the compilation of his "*Codex Juris Gentium Diplomaticus*," gave, in his preface to that work, a very distinct exposition of the basis of what he termed "*Jus Feciale inter Gentes*." His follower, however, if not pupil, Baron von Wolff, although distinguished for his vast learning and his methodical and voluminous treatment of the Law of Nature and Nations, was not happy in his mode of prosecuting and developing the enlarged and philosophical views of Leibnitz. But, availing himself of the learned labours of Wolff, Vattel soon afterwards reduced them in bulk, moulded them into a neater and more popular shape, made some practical additions, and thereby attained a degree of celebrity equal to, if not greater than, his merits.

In his work, entitled "*Le Droit des Gens*," Vattel has introduced a good deal of what appears to be rather extraneous matter; namely, treatises on the Internal Public and

Private Law of States, as well as on International Law, properly so called, or, as the French now term it, "*Droit Public Externe*." And how his celebrity should have been so much greater than that of Wolff, in Britain as well as on the Continent, it is not easy to see; except from Vattel having endeavoured to clothe the doctrines in a lighter, more agreeable, and attractive dress; and from the subject not having been previously much attended to in England. But from whatever cause, such was the fact. The work was lauded by several eminent statesmen in parliament; was translated into English; and seems, in Britain, for upwards of half a century, to have been held and appealed to as the standard more modern work on the Law of Nations.

With regard, again, to the internal cultivation of the Law of Nations in Britain, England, although not entitled to claim him as a native, might boast of the great learning and, for his age, acute and extended views of the Italian, Albericus Gentilis, inasmuch as he was Professor of the Law of Nations in the University of Oxford, and apparently an eminent practical lawyer in matters of maritime right, as well as a distinguished theoretical international jurist.

It is, perhaps, to be regretted that Selden devoted his great learning and talents to the support of some extravagant claims in behalf of England, to the exclusive dominion of certain adjacent seas — such extravagant claims as Venice, Genoa, Spain, Portugal, and Holland, had previously urged. For it does not appear that any such exclusive claims were ever practically exacted, or attempted to be enforced by England. And the argument maintained by Selden in support of such claims, whether in order to please a despotically inclined monarch or not, has all along afforded, and even very lately, an opportunity and excuse for foreign jurists to declaim against what they call the unjust maritime pretensions of this country.<sup>1</sup>

Indeed, so far as regards International Law, England has much less reason to be proud of Selden than of Dr. Richard Zouch (Zouchæus), who, about the middle of the 17th cen-

<sup>1</sup> Rayneval, "*De la Liberté des Mers*," 1811, vol. i.

tury, was Professor of Law at Oxford, and afterwards Judge of the High Court of Admiralty; but to whose reputation, as an author, justice does not appear to have been done in his own country at all corresponding to his merits; and with him ended, for the 17th century, the cultivation in England of International Law; with the exception of the memorials and opinions of Sir Leoline Jenkins, in the reign of Charles II., chiefly on the maritime department of International Law. For the excellent work of Molloy, in 1682, treats almost solely of the Private Law of Maritime Commerce.

In the 18th century, with the exception of the admirable answers by Sir Dudley Ryder and Mr. Solicitor-General Murray, afterwards Lord Mansfield, to the Prussian Manifesto relative to Maritime Prize Law, no work appeared on the Law of Nations generally, till the publication, about the middle of last century, by Dr. Rutherforth of Oxford, of his lectures, or commentaries on the work of Grotius de Jure Belli. And during the remainder of the 18th century, no work appeared on the science generally of International Law. For the excellent pamphlet of Jenkinson (Lord Liverpool), and the admirable judgments of Sir William Scott (Lord Stowell), as reported by Sir Christopher Robinson and other learned jurists, related almost entirely to the law of maritime captures as prize; while the truly excellent work of Abbot (Lord Tenterden), like the work of Molloy about a century before, embraces solely the private law of maritime commerce.

Although a learned and sensible work, the lectures of Dr. Rutherforth do not appear to have exercised much influence on the national mind of England, and seem to have been very much superseded by the translated work of Vattel, which, as formerly mentioned, still continues to be referred to in this country, as a standard International Law authority of the first order.

To return to the Continent: some time after the publication of the work of Vattel, the mode of cultivating International Law appears to have undergone a considerable change in Germany. The example which Leibnitz had exhibited

in the compilation of his *Codex Diplomaticus*, had been followed; and various voluminous collections of Treaties and other State papers had been printed not merely in Germany, but chiefly in Holland, and also in England; such as the collections of Dumont, Rousset, Rymer, and others. In these collections, the chronological order was followed, without much attempt at a more methodical or systematic arrangement; until it seems to have occurred to the ingenious Abbé de Mably, that a "*Droit Public de l'Europe*" might be "*fondé sur les Traités*."

About this time also, the less ingenious, but more industrious and learned German writers, Meister, Moser, and others, found it a more easy task to collect and arrange methodically the various stipulations and other provisions, which had usually occurred in the multitude of treaties concluded between the different European nations in the course of the two preceding centuries, than to evolve, unfold, or develop scientifically in detail, the fundamental principles of International Law. The liberality of the British King George II. to his native hereditary dominions, enabled the University of Göttingen, which he had founded, to accumulate a most extensive and valuable library. And availing himself of this resource, the very learned and indefatigably industrious G. F. Von Martens, beside his "*Traité des Prises*," his "*Cours Diplomatique*," and his collection of Treaties from 1761 to the present times — published in Latin in 1784, republished in a more complete form in French in 1789 and 1801, and finally published in 1821 a third edition of his work, entitled, "*Précis du Droit des Gens Moderne de l'Europe, fondé sur les Traités et l'Usage*."

In this way, certainly, the Law of Nations was advanced and improved, inasmuch as it was thereby rendered more practical, by the methodical arrangement of the usual stipulations in treaties, which, of course, while they lasted, independent states were bound to observe as special bargains, and to consult and be guided by in the first instance. But while this, no doubt useful, labour was going forward, the cultivation of International Law as a science, — the investigation of the reciprocal rights and obligations of nations, which

exist independently of special compact, — was neglected. This error or defect was perceived, admitted, and attempted to be corrected by the able Baron von Ompteda, in his both learned and scientific work entitled "*Literatur des Gesammten sowhol Natürlichen, als Positiven, Volkerrechts;*" or, "*Literature of the United Law of Nations, Natural, as well as Positive or Established.*" These views of von Ompteda were quite consistent with the truly philosophic views of Leibnitz. But the views of Meister and Moser, as well as those of Mably, Martens, and Klüber, appear to have been either narrow and unscientific, or fanciful and unfounded. According to the views of the two former, and their followers, International Law no longer deserved the appellation of a science; but was degraded and reduced to the methodical arrangement of the points embraced in the stipulations and provisions that had been usually inserted in the treaties, which had been concluded between the different European nations for two or three centuries past. "Moser," (says the Prussian Privy Councillor and lawyer, M. Schmalz,) "has neglected the philosophical exposition of historical fact, and the discovery or development of general principles, which might at once satisfy reason, and the views and practice of common life." But Mably, and particularly Martens and Klüber, appear to have been aware, this objection was too well founded. And, therefore, continuing the form or shape of the science, as it had been fashioned by Grotius, Rachel, Wolff and Vattel, exhibiting the state of general or common consuetudinary International Law, as it existed independent of negotiation, special bargain, or treaty, they confusedly mixed it up with particular or conventional International Law, resting solely on treaties; and by the introduction of what they called the principle of analogy, endeavoured to form an imaginary inferential theory or system, suited to particular national views and interests.

That the particular, or conventional, law of nations, founded on treaties, is, in many respects, highly useful, and has an existence as real, and a force as binding or obligatory, as the general or common consuetudinary law of nations, which exists without treaties, there can be no doubt. But

the operation and legal effect of these treaties are confined to the contracting parties; they are to be liberally interpreted, but according to the legal construction of the terms employed; and they are limited in point of duration, so far as regards the future, by the lapse of the specified period, by the complete fulfilment of the stipulated engagements, or by the occurrence of events by which they are legally extinguished, and cease to be obligatory, unless expressly renewed. They are, no doubt, to be consulted by the diplomatist in the first place, and complied with by the state or government; but simply because they are special bargains, creating particular rights, or imposing particular obligations, which would not otherwise exist at Common Law, or to the same effect; just as contracts or bargains between individuals in private life are usually entered into; not to alter the Common Law, but to create rights and obligations which would not otherwise have any existence. But not content with this priority in point of authority, consultation, and execution, thus conceded or justly belonging to conventional International Law, or to treaties, as special bargains, some of the recent German jurists, as Martens and Klüber, and also the Anglo-American lawyer, Dr. Wheaton, apparently endeavour, by the introduction of their principle of Analogy, as they call it, to found upon, or extract from, treaties, a kind of General (not particular) Conventional law, creating rights and obligations, in favour of some nations and adverse to others, beyond the contracting parties, and beyond the existence and limits of these treaties, either in extent or duration.

To this subject we shall revert in the course of our observations. In the mean time we shall merely notice shortly the still later foreign writers, on International Law, than those before mentioned.

After the death of M. G. F. Martens, a still farther edition of his work appears to have been procured at Paris, in 1831, by M. Pinheiro-Ferreira, the Portuguese ex-Minister for Foreign Affairs, in order that he might subjoin to the work of Martens his own notes, or commentaries, which are written in, certainly, an unnecessarily caustic and unhandsome style; but are frequently acute, and point out errors, into which

M. Martens had clearly fallen. M. Pinheiro-Ferreira had previously published, in 1830, his "*Cours de Droit Public Interne et Externe*,"—a work of considerable merit.

In 1839, Mr. Oke Manning, junior, published his respectable work, entitled "*Commentaries on the Law of Nations*."

In 1844 and 1845, Mr. Reddie, a Scotch lawyer, published a work, in two vols. 8vo., entitled "*Researches, Historical and Critical, in Maritime International Law*."

In 1845, M. Th. Ortolan, who appears to be a *protégé* of M. Dupin, published an interesting work, entitled, "*Règles Internationales de la Mer*;" some of the general doctrines of which we may have occasion to examine.

The Anglo-American lawyer, Dr. Wheaton, has this year published, at Leipsic and Paris, another edition, revised and enlarged, of his valuable work, entitled, "*Elements of International Law*," in the French language.

In 1845, M. Oppenheim, of Heidelberg, published a "*System des Völkerrechts*," embracing private, as well as public, International Law,—a short popular work, addressed by the author to the public, yet of some pretensions, as systematic, and written avowedly more for jurists and students, than for diplomatists.

But of all the recent foreign writers on International Law, whether German, French, or Portuguese, the most correct, concise, truthful, and impartial, is Professor Heffter, of the University of Berlin, in his treatise, entitled "*Das Europäische Völkerrecht der Gegenwart*,"—the European Law of Nations in its present state; which treatise he had undertaken to compose, jointly with the celebrated M. Gans, but of which, in consequence of the premature death of that distinguished author, he had to write the whole, and which he completed and published so recently as 1844.

We shall now proceed to trace the origin or sources and development of International Law; to endeavour to ascertain its basis or fundamental principles; and ultimately to contemplate its great component parts, and mark their distinctive characters.

## II. *On the Nature, Sources, and Development of International Law.*

In prosecuting our inquiries in International Law, we do not embrace the rules of general morality or ethics, by which the conduct of mankind, whether as individuals or as nations, may or ought to be governed. We confine our investigation entirely to the rules of coercive or compulsory justice,—to the juridical or legal relations of nations,—to those rules for the conduct of nations to each other, of which the observance may, in consistency with the principles of justice, reciprocity, and general expediency, be compelled by physical force.

Some ingenious and acute continental, particularly German, philosophers and lawyers, however, dispute the distinction here made, and deny the existence of any law of nations properly so called, that is, coercive or compulsory law, or of any thing more than the morality or ethics of nations; because separate independent nations have no superior on earth to whom they are responsible or amenable; because they acknowledge no supreme legislative power, and have, in relation to each other, no Gesetzgebung, no legislative enactments, and no guarantee, or means of enforcing such enactments. But the conclusion here deduced does not appear to us, by any means, to follow from the premises. It is quite true that, according to the arrangement which the omnipotent and all-wise Creator has established on this earth, separate and independent states, or men congregated into communities, living in civil society, under a government, and occupying a definite territory, have no superior on this globe, are not subject to any supreme power, legislative, or executive and administrative, and do not externally possess over, or in relation to each other, those sanctions, guarantees, or means of enforcement, which internally the united power of the great majority of the nation or community, the state or government, possesses over its citizens, or subjects. But it is equally true that, by the arrangement which He has made in this physical material, and physical mental world, the omnipotent and all-wise Creator has established certain laws, most of which men



must obey, many of which they may transgress, but not with impunity, and to which laws generally, their welfare, even in the present life, requires them to conform, in the exercise of the delegated power conferred on them. Mankind, considered in their collective capacity as nations, communities or states, as well as in their individual capacity, are manifestly capable of rights, which they are entitled to enforce, and susceptible of obligations which they are bound to perform or fulfil. Nor are these national rights and obligations left entirely without the means of compulsory enforcement; with regard to these means, sometimes denominated, though not very correctly, guarantees, or sanctions, there is, no doubt, a considerable difference, between external or international law, and the internal public or constitutional law, and the internal private jurisprudence of states. The guarantees or sanctions of international law are more slender, more feeble, than those of public or constitutional law, and much more insecure than those of internal private law. But this difference does not affect or alter the essence or nature of the right, or law. It is, in a great measure, the consequence of the less advanced state of the cultivation of the juridical relations of nations, which might obviously be greatly promoted by the establishment of proper and improved tribunals or courts of international law, judiciously constructed, and wisely and impartially directed or conducted, in a similar way to that, in which internally, in states, the common consuetudinary law is improved and matured. The want of such more powerful guarantees or sanctions, as belong to internal private civil law, or to the internal criminal law of states, does not at all take from the fundamental rules of international law their character of judicial or legal principles. And beside war, the last to be resorted to, of the means of enforcing it, the law of nations, like the internal civil and criminal law of states, has sanctions or guarantees, partly in the reciprocal interests and in the reciprocal fears of states and governments, partly in the political alliances of the weaker with the more powerful nations, or in the maintenance of national independence, through the balance of power.

Further, in prosecuting our inquiries into the Law of

Nations, thus limited and defined, we do not assume, or proceed upon, any fictitious data, or any imaginary compact among all nations, or, at least, all civilised nations, which never existed, and perhaps could not exist, or upon any supposed antecedent state of nature, whether of war or of peace, such as the hypotheses of Hobbes and Rousseau. We endeavour to ascertain International Law, only so far as it can be ascertained by observation and experience; by observation of the existing nations of the present age, and by contemplation of the nations which have existed in past ages, as represented in the authentic records of history. We do not aim at any other mode of investigation, than what has been attended with so great success, in the external physical material world, in the cultivation of what have been termed the inductive sciences. We do not pretend, by abstraction and new combinations of ideas, or any other merely intellectual operation, to ascertain all the juridical or legal relations which may possibly exist among nations, in regard to each other. We are content with endeavouring to ascertain those juridical or legal relations — those mutual rights and obligations — which have been almost intuitively perceived or apprehended, or logically deduced from premises thus founded on fact, and which have been recognised by civilised nations in their actual practice. Our object, in short, is the more accurately ascertainment of that international law which the later German jurists, and after them the French, have denominated *positif*, as different from what was previously called natural; the appellation *positif*, apparently corresponding to our English appellation established, in other words recognised and acted upon, by nations in their intercourse with each other.

But while we thus do not expound International Law, as founded on any universal or general simultaneous compact or agreement among all nations, or all civilised nations, and do not engage in a vain search for such a compact, we entertain no doubt of the existence of such a law as before described, as binding upon nations, as flowing from other sources, beside general or particular national consent or convention, and as having been, to a considerable extent, re-

cognised in practice, and established among the civilised nations of Europe; and those who have emanated from them, and now occupy the American or other continents. Indeed, we cannot contemplate the physical material and the physical mental world, which this earth and its inhabitants exhibit, without clearly discovering, that there are sources of right and obligation, anterior and superior to any which human consent or human law can create.

### *Sources of International Law.*

Like the internal common private law of states, the external common law of nations, it is manifest, must ultimately rest upon and be conformable to the laws which the omnipotent and all-wise Creator has established for the regulation of this portion of the universe, which constitutes to mankind what we call the physical and moral, or, more correctly, perhaps, the material and mental world, in which they are placed. And if, guided by observation and experience, we pass from the contemplation of individuals, living together in civil society, to the contemplation of such individuals, so associated and congregated, as constituting so many separate communities or states, we find, that among the latter also, as among the former, certain juridical or legal relations exist, or arise, in certain circumstances, anterior to, and independent of, any exercise of the national will; either internally in legislative enactment and executive administration, or externally in acts either unilateral, without any joint consent, or bilateral, involving the consent of others, such as conventions or treaties. And many, if not most, of these juridical or legal relations, and the concomitant or consequent rights and obligations, are simple and obvious, and are almost intuitively perceived or apprehended, and almost instinctively felt, by the ordinary population generally of whom states are composed. They come to exist in the consciousness or conviction of the people, just in the same manner, in which M. de Savigny shows the private rights and obligations of individuals living in civil society are unfolded, in the gradual progress of the internal jurisprudence of states.

Farther, if, prosecuting our investigations under the guidance of observation and experience, we contemplate the external relations of states, as composed through the civil and political union of individuals, either as actually existing in this age, or as having existed in past ages, as unfolded, described, and delineated in the authentic historical records transmitted to us by our predecessors, we find that the juridical or legal relations, which we have mentioned, as existing among nations, arise chiefly, if not entirely, from the following sources : —

*First Source.*

They arise, in the first place, from their co-existence and common nature and organisation as separate and independent states, and from their position or location on the surface of this globe, as occupying exclusively certain portions of that surface, as territories or dominions, contiguous or remote, and divided by seas, mountains, or rivers, whether in their early and apparently original rude state, or in a more cultivated and civilised condition, but without any previous direct act of reciprocal intercourse. The rights and obligations concomitant with, or consequent upon, these primary relations of states, appear to have been denominated by Grotius and his followers, “*Jus gentium naturale, necessarium et primarium* ;” and they are unquestionably the basis of all subsequent voluntary or conventional arrangements. They are inherent and involved in the very constitution and organisation of nations, and may, therefore, be called essential. They are general and common to all nations, and they last while the nation lasts ; and may therefore be distinguished as permanent or perpetual rights. But we cannot agree with some late writers, such as M. Th. Ortolan, in his “*Règles Internationales de la Mer*, 1844,” M. Oppenheim, in his “*System des Volkerrechts*,” and Dr. Wheaton, in the last edition of his “*Elements*,” 1848, in calling them absolute rights ; because all rights are, from their very nature, relative or bear relation to other persons, whether individuals or nations, and are limited and regulated powers.

That all the essential, general, common, and permanent juridical or legal relations, and consequent rights and obligations, which may possibly exist or arise between or among nations or states, have been perceived or felt and recognised in the practice of mankind, cannot be demonstrated by exhaustive analysis. And as little is there any reasonable prospect of obtaining any evidence of a simultaneous agreement either among all nations or even among the European nations and those who have emanated from them, recognising all the essential, common, and permanent juridical relations. But from the absence of any evidence of such a simultaneous agreement or joint consent, it by no means follows, that such juridical relations and legal rights and obligations have no existence. And instead of admitting, as the ablest very recent writer on the subject, Prof. Heffter, of Berlin (1844), seems to do in his introduction, that such an external law of states in relation to each other, does not actually exist for all the nations on the surface of this globe; and that it is only in Europe and among the nations who have emanated from it that such a law has come into general consciousness, or conviction and feeling, we would maintain that the essential, common, and permanent juridical relations among states exist and are applicable, in the course of their advancement in civilisation, to all the separate and independent nations of this globe, from Britain to China, from Russia and Sweden to the South of Africa and Australia; and if not intuitively apprehended and felt by all the ignorant inhabitants of these countries, are understood and felt by all those of ordinary intelligence, however much they may be disregarded in practice. Indeed, Prof. Heffter seems afterwards to be of the same opinion with us in the first section of his first book, where he treats of what he terms the fundamental rights of states. And without pretending to give any enumeration of these juridical relations, rights, and obligations, as founded on an exhaustive logical analysis, we may specify the following as the chief of the class of international rights and obligations to which we refer, as having been recognised in the course of past experience, although unhappily not always observed: —

1. Right of existence, and self-preservation as a state; in-

cluding the right of defence, resistance to aggression, and combat, or the use of physical force, against all nations or tribes which actually threaten danger, and of taking previous measures of security against such danger; as also the right to maintain the national integrity, and exclusive possession of territory and adjacent territorial sea, when bounded by the sea.

2. Right of national sovereignty and independence; freedom from foreign controul; equality of nations in point of right; exclusive self-government, legislative, and administrative — national and municipal.

3. Exclusive judicial power and jurisdiction in the administration of criminal or penal law, and of civil private law, with regard to persons, resident natives or foreigners, and with regard to property, immoveable, as lands, or moveable effects or commodities, domestic or foreign, situated within the territory.

4. Right of self-advancement as a people, cultivation and development; right to promote national welfare and prosperity.

5. Right to the common use of the oceans or large open seas, for the purposes of navigation; right to procure the produce of the open seas by fisheries.

6. Right to prosecute trade or commerce with such other nations as may be so disposed, subject to such restrictions as the collision with the higher and more important rights of other nations may render necessary.

7. Right to national reputation, name, and reciprocal obligation, to a fair and just estimation of national character.

Some of the ideas and feelings, only indefinitely indicated by these general terms, such as the right of resistance to personal assault, violent seizure of moveable effects, and territorial aggression, are intuitively apprehended and almost instinctively felt by all the population, of whom even rude tribes are composed. Most of them come home to the consciousness and conviction of individuals of ordinary intelligence, of whom the expressive but not easily defined attribute or quality of "common sense" can be predicated, and to the more educated classes of a community all of them are

either self-evident truths, or easy and obvious deductions from such truths. At all events, none of them are derived from, rest upon, or require for their foundation and recognition, any joint simultaneous consent, any bilateral contracts, or any conventional acts of nations, such as public treaties.

### *Second Source.*

In the second place, general common International Law is not limited to those primary juridical or legal relations among states, which we have just been contemplating. We find from observation and experience, that the powers and acts of men living in separate territories, and in independent civil societies or communities, are not confined to their merely internal concerns. From the mode in which the omnipotent and all-wise Creator has constructed this globe, and from the physical laws which He has established for the regulation of the mental as well as the material world, such as the diversities in climate, soil, and produce, natural and industrial, the different degrees of advancement made by nations in civilisation, in the cultivation of the earth, in the division of labour among individuals, and in the arts and sciences generally, mankind, as divided into nations, occupying separate territories, if not compelled from necessity or urgent expediency, are induced, by the desire of comfort and convenience, to have intercourse with the inhabitants of other countries than their own, for the purpose of an interchange of locally superabundant or superfluous commodities for locally requisite and useful commodities. And thus states and their subjects come to have acts to perform and lines of conduct to pursue towards each other. These acts of states and of their subjects, as of individuals in civil society, it is plain may either be separate, independent, and unilateral, without any express simultaneous, or joint consent or agreement on the part of two or more states; or they may proceed from the intervention of simultaneous joint consent between or among two or more nations. Under this second head we contemplate only those unilateral acts which do not involve any such joint consent or express agreement.

The unilateral acts of nations which we here contemplate, it is manifest, may be either beneficial or hurtful, and may, as such, create rights and obligations in other states without any mutual consent being interposed in conventions or treaties.

The merely moral or ethical sentiments of nations towards each other, being less requisite in consequence of their mutual independence, and being counteracted, perhaps, to a certain extent, by patriotic feelings, are certainly more feeble than among individuals living in the same society, who are much more dependent on each other. And accordingly, with perhaps a few exceptions, nations have seldom conferred gratuitously benefits upon each other. For if, in the arrangements of their tariffs of duties on the importation of the commodities of other nations, they occasionally favour particular states, these matters are generally effected by treaties of commerce; and proceed, not from purely benevolent, but from interested motives. At the same time, however, as among individuals, so among nations, unilateral acts, if beneficial, may create a right to reimbursement of unauthorised expenditure, incurred for the behoof of others, and a right to remuneration and recompence for laborious and skilful exertions, though unauthorised, if successfully and usefully bestowed and exercised for the behoof of others.

On the other hand, the separate and unilateral acts of independent nations, as of individuals, if hurtful, may, beside the primary right of defence or resistance to aggression, create or give rise to a right to restoration of the *status quo*, a right to restitution, when practicable, and when restitution is not practicable, a right to reparation or indemnification.

But these separate and unilateral acts of independent nations may, at the outset, be comparatively harmless, indifferent, convenient or inconvenient, or optional and matters of choice; and yet may come to have juridical or legal effects. And these effects may regard either the state which is the agent, or the state to which the act relates, or both of the two, or other nations. Thus, if a state has continued to follow a particular line of conduct in relation to other nations for a long period, and allowed them to proceed upon the faith and



reliance of its continuing to do so in future, it is not entitled suddenly to alter that mode of conduct, and to disappoint the reasonable expectations which it had thus excited, but must give due previous intimation of the intended alteration.

Again, among juridical relations, arising from such unilateral acts, without the intervention of express consent on either side, or treaty, the primary principles of national independence and equality in point of right, and the principle of reciprocity, have a very important and extensive influence. Thus, when a particular line of conduct is followed by any one nation towards other nations uniformly and for ages, the latter acquire a right to observe the same or similar line of conduct towards that nation in the same or similar circumstances. *Nam quod jus quisque dat aliis, eodem jure utatur.* And upon the principle of reciprocity and equally distributive justice, there arises a right in one state to act towards another state in the same or like manner, as that, in which the latter state has acted towards the former, provided the rights of third parties be not thereby affected. In other words, there arises an obligation on each state to demand or exact nothing from other states which it is not disposed to allow, or does not *de facto* allow them — an obligation to treat other states in the same or the like manner as that, in which it requires them to treat it.

Again, the continued acquiescence of a nation in a particular line or mode of conduct observed towards it by other nations warrants an inference of its consent to such treatment — to do away which a remonstrance or protest is necessary. And when two or more nations, without any joint consent or compact, separately continue for ages to observe the same or a similar line of conduct towards each other, they are reasonably held to have adopted that line or mode of action, and to have given each other a right to persevere in it until altered, either by a special convention, or by the separate spontaneously concurrent adoption of another line or mode, without any convention or treaty.

Farther, when these unilateral acts of states are not positively hurtful, and manifestly *primâ facie*, unreasonable and unjust, and, being indifferent, or matters of discretion, option,

or choice, have been uniformly repeated and continued for a long period, such as, during several ages, they become, like the long and uniformly repeated and continued acts of individuals in civil life, and in the internal private law of states — what we call general customs or usages; and, as in this internal common law, which determines the rights and obligations of individuals, they acquire a juridical validity and legal force. Nor, in recognising this doctrine, do we expose ourselves to the, perhaps at first sight plausible, objection which has been urged against all consuetudinary or customary law. It has indeed been argued, that there is an absurdity in propounding custom or usage, which is the mere repetition of the same or similar actions in succession, as the foundation of Law and Right. And, no doubt, it does not appear, at first sight, how an act, which is not originally right and legal, can be rendered such, by mere repetition, without the interposition of a legislator, having a just title and rightful authority to prescribe rules of conduct, or without the consent of both, and all the parties interested. But we do not here proceed on the supposition of the mere successive repetition of the same or similar acts, having of itself, or giving, much juridical value or legal validity. Along with M. Von Savigny<sup>1</sup> and the late acute Professor Puchta<sup>2</sup>, we view the long, successive, uninterrupted, and uniform repetition of the act, which constitutes the usage or custom, as clearly indicating and affording satisfactory evidence of the existence of the notion and feeling of right or legality in the consciousness and conviction of the great majority of the population, of whom the assemblage of nations is composed. In the uniformity of a long continued and permanent mode or course of action, we recognise its common root, as opposed to mere accident or chance — the firm belief of the people. And custom is thus the sign or mark, by which we recognise positive or established law, not its original foundation.

Thus, in addition to the “*jus gentium primarium et necessarium*” of Grotius, Wolff, and Vattel, there exists, what is properly enough denominated “*jus gentium secundum*”

<sup>1</sup> Von Savigny, *System des Heutigen Römischen Rechts*, §§ 12, 29.

<sup>2</sup> Puchta *Gewohnheitsrecht*, b. iii. c. 2.

darium" — a secondary branch of general common consuetudinary international law, arising from and founded on the habitual unilateral acts of nations, indicating their consciousness or conviction, and almost instinctive feeling of right, quite unconnected with, and distinct from, particular conventional international law, which, as we shall see in the sequel, rests entirely upon, and necessarily presumes, their joint and combined consent.

We have also, at the same time, pointed out a great many universally recognised international rights and obligations, which do not arise from, but are totally independent of, stipulation or treaty. And although we have not pretended to exhibit all these rights and obligations by an exhaustive analysis, we have given a tolerably specific enumeration from observation and experience.

#### *Third Source.*

In the third place, besides the rules of compulsory justice before noticed, which are applicable to independent nations, whether essential and primary, arising from their nature or organisation and position or location as such; or, secondary, from their urgently expedient, if not absolutely necessary intercourse with each other, as exhibited in their common habits of action, practices, and customs, there also exist or arise, as we have seen, a great multiplicity and latitude of actions and proceedings, not merely possible, but shown by experience to be practicable, which are not manifestly injurious or aggressive, but comparatively harmless or indifferent, or are optional and discretionary, to be directed by the will and consent of these nations. There are thus ample room and occasion, for having such proceedings regulated by express consent, in conventions, or public treaties. The utility of conventions or contracts in civil life, in the internal common private law of states, is found to extend to the intercourse of independent nations. And various rules come to be fixed between or among these nations, by such express stipulations, proceeding upon the general legal principle, *pacta sunt servanda*, and constituting what has, therefore, been denominated *jus pactitum* or *conventionale*.

Whether the rule, *pacta sunt servanda*, which is the foun-

dation of all contracts among individuals in civil life, and of all international treaties, although long recognised as such, be really a first truth, and not resolvable into another more simple element, is not, perhaps, altogether clear.<sup>1</sup>

But, without here aiming at any farther simplification of the basis on which conventional international law reposes, we willingly recognise the principle of *pacta sunt servanda* in its broadest sense, and to its full extent, as co-ordinate with the legal principles, *Neminem lædere, suum cuique tribuere*.

In point of fact, the great number of treaties which have been concluded among civilised nations in the course of the present and two last centuries, and which have not expired, or been legally annulled, or in any way ceased to be obligatory, form a large portion of International Law. And in each particular question, or disputed case, that occurs, although not the original or primary source of International Law, such treaties, especially the latest, are to be first consulted, as constituting the special bargain which the nation, or its government, has deemed it expedient to make in the circumstances; whether confirming a pre-existing rule of the common consuetudinary law, or abandoning a pre-existing right or obligation, or creating in future, for a time, a right or obligation, when the point was previously a matter of indifference, or discretion, or of choice, or option.

We hold, also, that public treaties in general are *bonæ fidei contractus*, and are to be construed, not literally and strictly, but liberally and according to their spirit; concurring in the following doctrine of the Prussian professor, Hoffner<sup>2</sup>: — “Treaties are legally obligatory, and binding in duty to complete honest and fair, or candid fulfilment of whatever has been thereby undertaken to be performed; and doubtless, not merely of what has been thereby literally promised, but also of what is conformable to the essence of every contract — of what is conformable to the concordant views and intentions of the contracting parties, that is, the spirit of the treaty.” (*Gemäss dem Geist der Verträge*.)

<sup>1</sup> Bentham's Works. Austin, Province of Jurisprudence determined, p. 365., and Warnkoenig, Rechts-philosophie, §§ 175, 176, 177, 178. Freiburg, 1839.

<sup>2</sup> Das Europäische Völkerrecht der Gegenwart, p. 94. Berlin, 1844.

Farther, conventional treaties among nations are particularly useful, in ascertaining and in improving the state of International Law. In that law, various cases occur in detail, in which a certain indefinite time is involved as a condition or limit, or in which a more precise description of goods, or effects, as articles of commerce, is required. And in such cases treaties, for instance, by fixing the period, allowed upon a rupture, for the departure of foreigners, or by specially describing what goods are to be deemed contraband of war, perform in some measure the functions of statutes or legislative enactments, in the common private law of a state, when the statute fixes the period of prescription, and determines other such matter naturally indefinite.

In international common law, likewise, as in the internal private common law of states, the common customary rules adopted in practice may, in the progress of civilisation, become cumbrous, or productive of hardship to third parties, not intended or required, or, in such altered circumstances, no longer adapted for the attainment of the legitimate object which all parties had in view. And in such cases of common consuetudinary international law, conventional treaties among nations, to a certain extent and in some manner, serve the purpose of legislative enactments in the internal common private law of states; and are useful in affording an opportunity to nations of modifying the customary rules which previously prevailed in practice, and establishing rules in the reciprocal intercourse of the contracting parties. But the analogy, in this respect, between treaties in international common consuetudinary law, and legislative enactments, in the internal common private law of states, obviously extends no farther. Legislative enactment is manifestly the exercise of the supreme power of the state concentrated in the government, and binding upon all the members of the community, who, though fellow citizens in relation to each other, are the subjects of the state or government. But there is no such supreme legislative power among, or over separate nations, who are confessedly independent of each other, and have no superior on earth.

Farther still, when a rule of conduct in their reciprocal inter-

course has been adopted by treaty by all civilised nations, (by which is generally understood the European nations and those who have emanated from them,) that rule may not only become, by this express almost universal consent, a part of positive or established international law among these nations, as long as the treaty endures or is renewed, but may, by long continued reciprocal observance after the treaty has ceased to be binding, become a part of general common consuetudinary international law. For such a purpose, however, or to have such an effect, the consent given by treaty or convention must have been universal, so far at least as regards the nations to whom the rule is sought to be applied, and at all events must have been given, and the rule continued to be observed by the nations against whom it is urged, after the lapse of the period of duration of the treaty, or its cessation from other legitimate causes.

For a particular treaty or convention between two, or among several nations, however numerous, acceded to by other nations, can never bind those nations who are not parties to it. Learned and industrious men, like M. de Martens, may collect from the great numbers of treaties which have been concluded among civilised nations, the usual subjects of stipulation, and may, by arranging and classifying the rules so stipulated, produce a systematic work, binding and obligatory, upon the contracting parties, so far as the treaties out of which it is compiled or composed, are still in existence and force; and such a compilation may, no doubt, be otherwise useful historically. But, it is vain to maintain that in this way any code of International Law can, consistently with sound legal principle, or accurate logical deduction, be reared up or created, such as to be binding upon the nations who were not parties to the treaties, or even upon the contracting parties, after those treaties have expired from lapse of time, or ceased, from other legitimate causes, to be legally obligatory.

We have thus traced the origin of International Law to three distinct sources, all existing in fact, and ascertained by observation and experience; and as the result, we find two distinct branches, or component parts, or divisions of that

law : first, Common consuetudinary law, including its scientific development by jurists and judicial determinations ; secondly, Conventional law, composed of rules established by treaties still in force and legally obligatory.

Beside these sources and this bipartite division, we do not see any valid grounds for admitting as branches or component parts of International Law, either the "analogy" of M. de Martens and M. Klüber, or the "reason" of M. Ortolan and of M. Th. Ortolan, the latest French writers on this subject.

If, by "analogy," be meant reasoning or logical deduction from premises by analogy, it is a faculty of the mind applicable to all the sciences as well as that of International Law ; and obviously cannot, as such, with any propriety be viewed as a branch of that law, or, indeed, of any particular science. If by analogy it be understood that, not merely identical or similar cases, but likewise analogous cases, are to be held sufficient to support an argument or general rule inferred or deduced from them, there will be great risk of these inferences or deductions from analogous cases proving erroneous ; and, although analogical reasoning is certainly admissible, if cautiously conducted, in the science of International Law, as well as in all the other sciences, it cannot properly be said to constitute a component part of that law, either co-ordinate or subordinate.

As little can we concur with M. Th. Ortolan, and the eminent French lawyers whom he states he consulted, in placing "reason" as the first branch or source of International Law, along, and co-ordinate with Common consuetudinary law and Conventional law. Indeed, he seems to have fallen into the error of preceding writers, pointed out by Mr. Bentham. For there does appear to be an awkwardness, or inaccuracy, if not inconsistency, in the arrangement which M. Th. Ortolan merely adopts after several anterior writers ; inasmuch as it places "reason" as the *first* source or branch of International Law, and at the same time holds that "reason" is only to be consulted in the *last* place, after Conventional, and after

- Common consuetudinary law. There can be no doubt that in practice, the Conventional law of nations ought to be first consulted ; because a treaty is a special contract by the state or government, very frequently conferring a right or imposing

an obligation which did not previously exist, and usually a deviation, by the express consent of contracting parties, from the pre-established practice. And the error seems to consist in introducing "reason" as the first constitutive authority in positive or established International Law. The truth, indeed, seems to be, that reason may be exercised as a faculty, or appealed to as an authority, both in interpreting the import of treaties, that is, the Conventional law, and in discerning and ascertaining the Common Consuetudinary law of nations, as founded on their juridical relations, and on their long established and uniform practice; but cannot be correctly introduced, either as a branch or as a source of International Law, any more than of any other science. In modern languages, reason appears to have chiefly two meanings; either what is reasonable, what reason enjoins or dictates (*ratio juris, rationis dictamina*), or the faculty, by which the mind intuitively perceives or apprehends first truths; or "*l'Art de Raisonner*," so beautifully illustrated by the Abbé de Condillac, in his "*Cours d'Etude*," in its application to physical astronomy, viz. the faculty of logically deducing the consequences which flow from first truths, intuitively perceived or apprehended, or otherwise pre-established. But if the term reason be used to denote a faculty of the mind, it obviously, in that sense, cannot be employed, either logically or grammatically, to convey the idea of a branch or department of law for the compulsory regulation of human conduct. And if it be used to denote what is reasonable, what reason dictates, among nations, reason is, no doubt, in that sense sufficiently comprehensive to embrace law; but it is manifestly too comprehensive and indefinite to include merely and solely, and to define or describe distinctly, law susceptible of coercion, much less to form a subordinate member in an arrangement of the branches or constitutive parts of a particular department of such law.

Having now traced the sources and distinguished the two great branches or component parts of International Law, we shall proceed in our future numbers to mark the nature, limits, and effects of these two branches, Common consuetudinary, and Conventional.



## ART. III. — BROOM'S LEGAL MAXIMS.

*A Selection of Legal Maxims, classified and illustrated.* By HERBERT BROOM, Esq., Barrister. 2d edition. Maxwell, 1848.

THE design of this work is a good one, and it has been well executed. There are few who will not be instructed and interested in its perusal. Out of an alphabetical list of law-maxims, collected from various sources, and about five hundred in number, one hundred are taken by the author as illustrative of certain important branches of the law, and are thus divided into ten chapters, as follows: — Chap. I. s. 1., Rules founded on Public Policy; s. 2., Rules of Legislative Policy. Chap. II., Maxims relating to the Crown. Chap. III. s. 1., The Judicial Officer; s. 2., The Mode of administering Justice. Chap. IV., Rules of Logic. Chap. V., Fundamental Legal Principles. Chap. VI. s. 1., The Mode of acquiring Property; s. 2., Property — its Rights and Liabilities; s. 3., The Transfer of Property. Chap. VII., Rules relating to Marriage and Descent. Chap. VIII., The Interpretation of Deeds and Written Instruments. Chap. IX., The Law of Contracts. Chap. X., Maxims applicable to the Law of Evidence.

The work is, therefore, obviously incomplete in two respects: all the maxims are not illustrated, nor is any one maxim attempted to be exhausted by giving its full bearing on every branch of the law. But so far as the author's design goes, we think that in general the maxims that he takes up are well selected, and the instances which he selects of their bearing on the particular branches of the law of which he treats, are brought out in a clear and striking manner. Mr. Broom's intention, we apprehend to be, to furnish the reader, and more especially the student, with a stock of principles which, being well acquainted with, he may proceed on his way with some confidence. Many modern treatises rather encumber the beginner than assist him. Like David in

Saul's armoury, he is borne down by the heavy weapons that he attempts to put on; but in this book he will find the "five smooth stones from the brook." If it accustoms him to trace up all the rules of law which he learns to their true principles, he will find this habit of the greatest service. It will also surprise him to find of how much use in practice these same principles are to him. If he relies on a knowledge of cases, in contradistinction to a knowledge of principles, he will soon discover he has mistaken the shadow for the substance; and that if he accustoms himself, in dealing with the conduct of business in any department of the law, to consider in any given case its governing principle, he will not only come to a much more satisfactory conclusion, but take a much easier and shorter road than if he attempt merely to find some parallel case. As this book will teach the student this habit, and will, to a certain extent, be a guide to him in acquiring it, we strongly recommend its careful perusal.

Having now explained its general object, we shall make one or two extracts, which will show the apposite manner in which Mr. Broom draws from the legal treasury illustrations both old and new. Let us first take his statement of the law as to Sabbath legislation. We omit the references throughout: —

"The Sabbath day is not *dies-juridicus*, for that day ought to be consecrated to divine service. The keeping one day in seven holy as a time of relaxation and refreshment, as well as for public worship, is, indeed, of admirable service to a state, considered merely as a civil institution, and it is the duty of the legislature to remove as much as possible impediments to the due observance of the Lord's day. Accordingly the judges cannot sit on a Sunday, this day being exempt from all legal business by the Common Law. So, by the statute 29 Car. 2. c. 7. s. 6., service of a writ of summons or other process on a Sunday is void, and no subsequent act of the defendant will be deemed a waiver of this irregularity; and, by the same statute, no arrest can be made upon a Sunday, except for treason, felony, breach of the peace, or generally for some indictable offence. So service of the declaration in ejectment, or of a rule of court, must not be made on that day; nor can an attachment be put in force, or an execution be executed, then. So an arrest made on a Sunday is illegal, unless after a

negligent escape. Bail may, however, take their principal on that day. And it has been held, also, that when the 20th of July, which is the last day for service of notice of claim under the Registration Act, 6 & 7 Vict. c. 18. s. 4., happens to fall on a Sunday, service at the dwelling-house of the overseer upon that day is good service, for such delivery is no violation of any known rule of law; the overseer who receives the notice not being called upon to perform any duty which can interfere with the most scrupulous observance of the Lord's day. If the day fixed for the commencement of term happens to be a Sunday, it must, for the purpose of computation, and in the absence of any express statutory provisions, be considered as the first day of the term, although, as the Courts do not sit, no judicial act can be done, or supposed to be done, till the following Monday. Where, however, the last day of term falls on a Sunday, it is enacted by stat. 1 Will. 4. c. 3. s. 3., that the Monday next following shall be deemed and taken to be the last day of term. Again, the statute 29 Car. 2. c. 7. s. 1. enacts that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings on Sundays, (works of necessity and charity only excepted); and that every person of the age of fourteen years, offending in the premises, shall forfeit the sum of 5s. The effect of which enactment is, that if a man, in the exercise of his ordinary calling, make a contract on a Sunday, that contract will be void, so as to prevent a party who was privy to what made it illegal from suing upon it in a court of law, but not so as to defeat a claim made upon it by an innocent party. A horse-dealer, for instance, cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday, though if the contract be not completed on the Sunday, it will not be affected by the statute. In a recent case before the House of Lords, it appeared that an apprentice to a barber in Scotland, who was bound by his indentures 'not to absent himself from his master's business on holiday or week day, late hours or early, without leave,' went away on Sundays without leave, and without shaving his master's customers: *Held* by the Lords (reversing the interlocutors of the Court of Session), that the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that that work, and all other sorts of handicraft, were illegal in England as well as in Scotland, not being works of necessity, mercy, or charity.

“Where, in an action of assumpsit for breach of the warranty of the horse, the defendant alone was in the exercise of his ordinary calling, and it appeared that the plaintiff did not know what his calling was, so that, in fact, defendant was the only person who had violated the statute, the Court held, that it would be against justice to allow the defendant to take advantage of his own wrong, so as to defeat the rights of the plaintiff, who was innocent.

“And for the like reason, in an action by the indorsee against the acceptor of a bill of exchange which was drawn on a Sunday, it was held that the plaintiff might recover, there being no evidence that it had been accepted on that day; but the Court said that if it had been accepted on a Sunday, and such acceptance had been made in the ordinary calling of the defendant, and if the plaintiff was acquainted with this circumstance when he took the bill, he would be precluded from recovering on it, though the defendant would not be permitted to set up his own illegal act as a defence to an action at the suit of an innocent holder.

“A person, however, can commit but one offence on the same day by exercising his ordinary calling in violation of the above-mentioned statute; and if a justice of the peace convict him in more than one penalty for the same day, it is an excess of jurisdiction for which an action will lie before the convictions are quashed.

“In addition to the class of cases which have been decided under the statute of Charles, we may refer to a recent case of a somewhat different description, in which the principle of public policy which dictated that statute was, however, discussed. In the case alluded to, a question arose as to the validity of a bye-law, by which the navigation of a certain canal was ordered to be closed on every Sunday throughout the year (works of necessity only excepted). In support of this bye-law was urged the reasonableness of the restriction sought to be imposed thereby, and its conformity in spirit and tendency with those acts by which Sunday trading is prohibited. The Court, however, held, that the Navigation Company had no power under the Act to make the bye-law in question; their power being confined to the making of laws for the government and orderly use of the navigation, but not extending to the regulation of moral or religious conduct, which must be to the general law of the land and to the laws of God.” (Pp. 18—22.)

This section is a fair specimen of Mr. Broom's manner of treating a subject, in which he sweeps the whole range of the

statute and common law to find pointed and useful illustrations of his subject.

On the maxim, *boni judicis ampliare jurisdictionem*, we find the following sensible remarks:—

“The maxim of the English law is to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice: and accordingly, the principle upon which our courts of law act is, to enforce the performance of contracts not injurious to society, and to administer justice to a party who can make that justice appear, by enlarging the legal remedy, if necessary, in order to attain the justice of the case; for the common law of the land is the birth-right of the subject, and *bonus judex secundum æquum et bonum judicat et æquitatem stricto juri præfert*. ‘I commend the judge,’ observes Lord Hobart, ‘who seems fine and ingenious, so it tend to right and equity; and I condemn them who, either out of pleasure, to shew a subtle wit, will destroy, or out of incuriousness or negligence, will not labour to support, the act of the party by the art or act of the law.’

“The action for money had and received may be mentioned as peculiarly illustrative of the principle above set forth; for the very nature and foundation of this action is, that the plaintiff is in conscience entitled to the money sought to be recovered; and it has been observed that this kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money, which, *ex æquo et bono*, the defendant ought to refund. ‘The ground,’ observed Tindal, C. J., in a recent case, ‘upon which an action of this description is maintainable is, that the money received by the defendant is money which, *ex æquo et bono*, ought to be paid over to the plaintiff. Such is the principle upon which the action has rested from the time of Lord Mansfield. When money has been received without consideration, or upon a consideration that has failed, the recipient holds it *ex æquo et bono* for the plaintiff.’

“The power of directing an amendment of the record, which a judge at Nisi Prius in certain cases possesses, may likewise be instanced as one which is confided to him by the legislature in order that it may be applied ‘to the advancement of substantial justice.’

“The general maxim under consideration is also peculiarly applicable with reference to the jurisdiction of a judge at cham-

bers, and to the many important and arduous duties which are there discharged by him. The proceeding by application to a judge at chambers has, indeed, been devised and adopted by the Courts under the sanction of the legislature, for the purpose of preventing the delay, expense, and inconvenience which must inevitably ensue if applications to the Courts were in all cases, and under all circumstances, indispensably necessary. A judge at chambers, indeed, acts under the delegated authority of the Court, and his jurisdiction is essentially different from that of a judge sitting at Nisi Prius; for in the latter case, the judge, it has been said, has no equitable jurisdiction, and can only look at the strict legal rights of the parties on the record; whereas, in the former, the judge has a wider field for the exercise of his discretion, and, in some instances, has a supreme jurisdiction which is not subject to the review of the Court in banc.

"In a recent case, where it was held that a judge at chambers has jurisdiction to fix the amount of costs to be paid as the condition of making an order, the maxim to which we have here directed attention was expressly applied. 'As to the power of the judge to tax costs,' remarked Vaughan, J., 'if he is willing to do it, and can save expense, it is clear that what the officer of the court may do, the judge may do, and *boni judicis est ampliare jurisdictionem*, i. e., *justitiam*.'

"Again, in construing an act of parliament, it is a settled rule of construction that cases out of the letter of a statute, yet within the same mischief or cause of the making of the same, shall be within the remedy thereby provided; and accordingly, it is laid down, that for the sure and true interpretation of all statutes (be they penal or beneficial, restrictive or enlarging of the common law), four things must be considered:—1st, What was the common law before the making of the act; 2dly, What was the mischief for which the common law did not provide; 3rdly, What remedy has been appointed by the legislature for such mischief; and, 4thly, The true reason of the remedy, and then the duty of the judges is, to put such a construction upon the statute as shall suppress the mischief, and advance the remedy, to suppress subtle inventions and invasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*. In expounding remedial laws, then, the Courts will extend the remedy so far as the words will admit. Where, however, a case occurs which was not foreseen by the legislature, it is the duty of the judge to declare it *casus omissus*; or where the intention, if

entertained, is not expressed, to say of the legislature, *quod voluit non dixit*; or where the case, though within the mischief, is not clearly within the meaning, or where the words fall short of the intent, or go beyond it; — in every such case it is held the duty of the judge, in a land jealous of its liberties, to give effect to the expressed sense or words of the law in the order in which they are found in the act, and according to their fair and ordinary import and understanding; for it must be remembered that the judges are appointed to administer, and not to make, the law, and that the jurisdiction with which they are entrusted has been defined and marked out by the common law or acts of parliament. It is, moreover, a principle consonant to the spirit of our constitution, and which may constantly be traced as pervading the whole body of our jurisprudence, that *optima est lex quæ minimum relinquit arbitrio judicis*; *optimus judex qui minimum sibi*, — that system of law is best, which confides as little as possible to the discretion of the judge, — that judge the best who relies as little as possible on his own opinion." (Pp. 56—60.)

We have thus enabled our readers to judge of Mr. Broom's labours for themselves, and we shall be surprised if they do not agree with us in our opinion as to their great merit.

We have detected very few errors. In a work extending over so wide a range of the law, the following may be well excused: — In alluding to the maxim, *Nemo plus juris in alterum transferre potest quam ipse habet*, Mr. Broom says, "It must, however, be observed, that the maxim above mentioned, which is one of the leading rules as to titles, is said not to apply to wrongful conveyances or tortious acts; for instance, *prior to the stat. 3 & 4 W. 4. c. 74.*, if a tenant for years made a feoffment, this feoffment vested in the feoffee a defeasible extent of freehold." But the *stat. 3 & 4 W. 4. c. 74.* did not in any way affect the tortious effect of a feoffment, which is taken away by the *stat. 8 & 9 Vict. c. 106. s. 4.* In illustrating this maxim, Mr. Broom should have noticed that a man may by custom be enabled to transfer a greater extent than he has, as happens in a great part of the manors in the West of England. In treating of the maxim, *Licet dispositio de interesse futuro*, &c., Mr. Broom should have noticed the application of the doctrine of estoppel to the conveyance of future interests, especially the case of *Bensley v.*

Burdon, 2 Sim. & Stu. 519. In some cases Mr. Broom retains, as worthy of illustration, maxims which we think had better be dropped as soon as possible. One of these is, *In fictione juris semper æquitas consistit*. The tendency of recent legislation has certainly been very properly to discountenance this maxim. Fines and recoveries have been abolished, many of the special pleading and process fictions have been discontinued, and we hope that the whole tribe, including the action of ejectment, will soon be swept away. We are glad, therefore, to find Mr. Broom concluding this section by saying —

“The introduction of fictions into the law must be considered as detrimental to it, whether regarded as a practical or as an abstract science; and the propriety of retaining those fictitious forms and modes of pleading, which originated in the subtlety of our ancestors, may well be questioned.” (P. 95.)

In the same class of exploded maxims we would place *Hæreditas nunquam ascendit* (illustrated p. 400.), now abolished by 3 & 4 W. 4., c. 106., except so far as titles on descents on deaths previous to 1st of January, 1834. We should also exclude from a list of maxims actually in force that of *Actus legis nemini est damnosus*, which is practically untrue. Nor do we think the maxim, *Omnis innovatio plus novitate perturbat quam utilitate prodest*, should have been given without a full citation and illustration of the Baconian maxims directly contradicting it. Mr. Broom cites 2 Bulst. 338. for this maxim; why does he not take, as a better authority, Dan. vi. 15.?

Perhaps, indeed, our author is a little too fond of the law as he finds it; and when he says (p. 114.) “the Common Law itself is nothing else but reason,” we are reminded of the conversation between the Laird of Ellangowan and his lady, as recorded by the learned sheriff of Selkirkshire. “A term day is not begun till it’s ended.” “That sounds like nonsense, my dear.” “May be so, my dear; but it may be very good law for all that!”<sup>1</sup>

But we say, for all that, Mr. Broom has produced one of the few books which may be usefully read by the student, as likely to convey correct and distinct impressions to his mind.

<sup>1</sup> Gu, Mannering, vol. i. ch. 9.



## ART. IV. — SCOTCH ENTAILS.

11 & 12 *Victoriæ*, cap. 36. *An Act for the Amendment of the Law of Entail in Scotland.* (4th August, 1848.)

A COMPREHENSIVE and important improvement on the law of Scotland has been made by the statute, the title of which is prefixed to this article. Entails have been abolished as perpetuities; and there has been substituted a modified system analogous to that which has long prevailed in England.

We intend to analyse the amending statute, to show the advantages which will result from it, and to inquire whether it ought to be considered sufficient or whether a further change would be advisable. But it is necessary towards the right understanding and development of these topics, to take a retrospective view of the Scotch Law of Entail, the evils which resulted from it, and the remedies which, from time to time, have been adopted or proposed.

Although previously to 1685 there are judgments of the Scotch courts which may be deemed to have recognised the legality of entails, yet the sounder opinion seems to be that, until the statute of that year, they did not constitute an integral part of the law, at least in the rigid form which that statute authorised. By the Act 1685, cap. 22., power was given to create entails not only with an infinite series of heirs, but with whatever provisions and conditions the entailor should think fit, and to guard the deed with strict prohibitions against selling or burdening the lands under the sanction of forfeiture, which the next heirs were entitled to enforce. The binding power of the entail was, by registration, completed not only against heirs, but also against creditors. It has been thought remarkable that a statute so adverse to the public welfare should have been introduced into the law of Scotland at a time when strict entails had ceased to exist in England. But this anomaly is attributable to the anxiety of

the Scottish aristocracy to guard themselves against the iniquitous forfeitures which the political state of the country had made of frequent occurrence. In furtherance of this object the statute 1690, cap. 33., (passed immediately after the overthrow of the Stewart dynasty) enacted that heirs of entail should not be prejudged by the forfeiture of their predecessors, provided the deeds contained the requisite protective clauses and were validly recorded. After the Union, the operation of forfeiture was, by a combination of statute and judicial decision, placed on a footing very similar to that which exists in England.

Under this system entails increased rapidly in Scotland. A belief prevailed that a great part of the lands had been subjected to entail, and five hundred entails were recorded between 1685 and 1765. The evils resulting from the prevalence of the system forced themselves on the consideration of all classes about the middle of the last century. Entails, it was ascertained, were very injurious to the improvement of land, by the limitation of leasing powers, the discouragement of outlay, and the prevention of subdivision; were unjust to creditors, oppressive to younger children, and hurtful to proprietors themselves. Eminent jurists and political economists examined the results of the system and effectively exposed its inherent evils; and, with one exception, all men of note conversant with the law of Scotland were adverse to strict entails. An attempt was made to procure a remedy, and the duty of suggestion was devolved on the Faculty of Advocates. In 1764, that body, by a large majority, declared that it was expedient to abolish perpetuities; and the heads of a bill were prepared. The proposed preamble recites the act of 1685, and sets forth that the numerous entails which had thence resulted "are by experience found to be attended with many ill-consequences both to public and private interest." The remedial sections deal with future and with existing entails. For the future, entails embodying the strict clauses restraining the heirs in the full enjoyment of their estates and placing such estates *extra commercium*, are prohibited, at least for any period longer than the lives of the heirs in existence at the date of the deed. But entails, establishing the line of succes-

sion and restraining heirs from altering it by voluntary gratuitous deeds, are to continue to be valid. Existing entails are to continue in force during the lives of the heirs, who shall be in life at the date of the proposed statute; and, after the failure of such heirs, those entails shall stand on the same footing with future entails under the act. The measure was submitted to the consideration of the Judges of the Court of Session, who declined to give an opinion; but it was approved of by the Barons of Exchequer, the Society of Writers to the Signet (who in Scotland are the practical conveyancers), most of the Counties, and the delegates of the Royal Burghs. This general opinion was ultimately thwarted by the activity of a few men of influence, of whom the chief was Sir John Dalrymple, known as the author of the "Memoirs of Great Britain and Ireland," and whose "Treatise on the Polity of Entails" is, perhaps, the best defence of them which has been made.

But although unsuccessful, this effort was not wholly unproductive of results which might have been beneficial, had more liberality been evinced. Attention had, in an especial manner, been directed towards the obstacles which entails presented to the improvement of land. In the heads of the bill proposed by the Faculty of Advocates, provision had been made against the insertion of restrictions upon the powers of leasing. In his treatise on entails, Sir John Dalrymple suggests what he styles "Rectifications," of which the chief are to enable the heir in possession to grant long leases, to make exchanges of land, to charge the estate with outlay for improvements, and to provide for widows and younger children. The portion of those suggestions which relates to leasing and improvements, was carried into effect by the 10 Geo. 3. c. 51. (1770), which, from the name of its promoter, is, in familiar law parlance, called "the Montgomery Act." By it proprietors of entailed estates are authorised to grant leases for fourteen years and one existing life, or for two lives and the life of a survivor, or for any number of years not exceeding thirty-one, under specified conditions of improvement. Building leases for ninety-nine years may likewise be granted under certain conditions. The proprietors

are also empowered to charge the estate to the amount of three-fourths of the sums laid out on specified improvements not exceeding four years' free rent. Powers are likewise given to them to exchange portions of land to a specified extent. But the act is encumbered with minute regulations, the neglect of any one of which (as the interpretation has been strict) has been held to be fatal to the transaction. With the exception of occasionally granting building leases, proprietors have taken little advantage of the statute, as farmers are unwilling to hold leases under it and capitalists to lend money on the security which it gives.

The inherent evils of the system were mitigated, in some measure, by the rules of interpretation by which the Courts were governed in their decisions. Entails were deemed to be encroachments on the common law, and the Judges, dealing strictly with the statute, refused to bind the heir in possession where the entailer had not done so in express words, thus rejecting all restraints by implication, and giving the heir the full powers of proprietor and fiar without regard to the presumed intention of the entailer. This doctrine, although practically advantageous, was of questionable legal soundness; and it was, ultimately, overruled by the House of Lords in a series of noted cases, by which the rule was fixed that, while strict construction was to govern in ascertaining whether restraints existed, the restraints having been ascertained, the ordinary canons of interpretation were to be applied.

This doctrine was, for a time, viewed as repugnant to the principles of the law of Scotland; but, gradually, its compatibility was recognised, and entails were dealt with subject to the results which it imposed. Public statutes had, at different times been passed, in some respects relieving heirs of entail or enlarging their powers; but, as all of them are of minor importance, details would be needless. Numerous private acts have also been obtained authorising sales, burdens, or other dealings. But, in 1824, a statute was passed which requires particular notice. It is the 5 Geo. 4. c. 87., authorising the proprietors of entailed estates in Scotland to grant provisions, 1st, to wives or husbands, to the extent of one-third part of the free rent; and 2dly, to younger children to

the same amount. This statute (commonly called "Lord Aberdeen's Act") was well received, as it was, apparently, accordant with equity; but it was soon discovered that its provisions were, practically, either hurtful or nugatory. A proprietor could not avail himself of the provisions of the 10th of Geo. 3. and of the 5th of Geo. 4., without such a reduction of the income of the estate as would leave a small residue. A calculation was made that, by the joint operation of the statutes, the free disposable income of an heir in possession of an estate of 12,000*l.* a-year might not, and sometimes did not, exceed 2000*l.*

Meanwhile the number of entails had greatly increased, as, during the period between 1765 and 1825, one thousand and ninety-one had been recorded. This increase, combined with the failure of the successive remedies, again directed public attention to the necessity for legislative interposition. The subject was discussed in able dissertations<sup>1</sup>, and in 1828 it was examined by a select committee of the House of Commons. Witnesses, chosen from various classes and professions, were examined, and much important evidence was obtained. All of the evils imputed to the system were proved, and a remedy was suggested purporting that Scotch entails should be placed on a footing analogous to those of England, with such modifications as might consist with the rules of Scotch law, and with such alterations as might correct the defects of the English system. Two reports were made by the Committee, and two bills were framed in accordance with their combined purport. The title of the one was "to regulate future Tailzies in Scotland," and that of the other "to grant certain Powers to Heirs of Tailzie in Scotland, to relieve such Heirs from statutory Burdens affecting the tailzied Estates, and from Debts incurred in the Improvement of the same." Neither of these bills was suited to afford an effective remedy; for both were, in some respects, unsound in principle; the provisions were complicated and obscure, and the

<sup>1</sup> Allusion is specially made to a Dissertation by Mr. Patrick Irvine, Writer to the Signet, and to an article in the *Edinburgh Review* for February, 1826, vol. xliii. p. 442.

machinery was cumbrous. These bills were brought into parliament in 1829; but they were abandoned and not resumed, by reason, probably, of the important public measures which engrossed attention during many subsequent years. But the inquiry was not altogether ineffectual; for in 1836 an act (6 & 7 W. 4. c. 42.) was passed, by which powers are given to grant, notwithstanding prohibition, but under certain limitations, leases of land for twenty-one years, and of minerals for thirty-one, to exchange any portion of the entailed estate for equivalent contiguous lands, and to sell portions of the estate for payment of the entailor's debts. The two latter powers are to be exercised under the authority of the Court of Session. This act was by the 1 & 2 Vict. c. 70. extended to unrecorded entails. These remedies were valuable, but inadequate; and the number of entails, with the attendant evils, continued to increase. In the interval from 1835 to 1846, the number recorded was four hundred and fourteen.

The general conviction, and the pressure felt by many heirs in possession, combined with the recent simplification of the modes of transfer of real property, revived the anxiety to obtain the abolition of the system of entails, or a great modification of it. The reform was favourably viewed by the administrators of Scotch affairs, and a bill for the purpose was promoted by the present Lord Advocate of Scotland. The bill, which was skilfully prepared, was submitted to the consideration of the law corporations, the county meetings, and other public bodies, and obtained general approval. Suggestions were made, and we have reason to know that they were well received by the promoter and that some of the more important were adopted. With some alterations the bill forms the act for the amendment of the law of entail in Scotland of 1848. In analysing this statute we will not follow the order of the sections, but we will class those sections which relate to the same subject matter.

The preamble bears that "the law of entail in Scotland has been found to be attended with serious evils both to heirs of entail and to the community at large, and it is expedient that the same be amended in manner hereinafter provided for."

*Sections 1, 2, 3. 31, 32. 38. 40. 42. and 50.* — The primary group of sections embodies the provisions for disentailing. They concern both future and existing entails, and the 1st of August, 1848, is the governing date. Under future entails, an heir born after the date of the deed shall be entitled, of his own right, to acquire the estate in fee-simple. If born before the date of the deed, he shall have power to disentail with the consent of the heir next in succession, being the heir apparent under the entail, who must be twenty-five years of age and born after the date of the tailzie. Under existing entails, heirs born after the governing date shall have the same power to disentail as heirs born after the date of future entails. Heirs born before the governing date may disentail with the consent of the heir apparent of twenty-five years of age born after that date. And the heir under any existing tailzie may disentail if he be the only heir in existence and unmarried, or otherwise with the consent of the three nearest heirs if there shall be so many. In all cases the heir disentailing must be of full age, and not subject to any legal incapacity. Guardians may consent for minors or persons legally incapable; the consent must be a formal document, and shall be irrevocable. The power of disentailing, like every other under the statute, is available, although the deed be not recorded or the heir have not taken sasine. The whole procedure must be under the authority of the Court of Session; and when that authority is obtained there shall be recorded an instrument of disentail (conformably to a schedule), declaring in substance that the lands are discharged from the restraints. The procedure, in so far as it regards third parties, shall be final, unless challenged within a limited time. The power of disentailing is modified by a provision that, where the descent of the estate has been secured by a marriage contract, there can be no disentail until the birth of a child or the dissolution of the marriage without one, unless the trustee under the contract shall concur.

It will save repetition to observe at once, that almost the whole of the powers conferred by the statute must be exercised under the authority of the Court of Session, con-

formably to procedure prescribed, and that power is given to the Court to make further regulations.

*Sections 4. 6. 24. and 38.*—The disentailing powers are followed by authority to the heir in possession (acting with the consents already detailed) to sell the lands, to charge them with debts or incumbrances, unconditional or subject to conditions and restrictions, and, with the exception of the mansion-house and its appurtenances, to lease or feu. But fines and grassums are prohibited. Excambions (exchanges) are authorised to be made by an application to the Court, in place of a cumbrous mode directed by the 6 & 7 W. 4.

*Sections 12, 13, 14, 15, 16, 17, 18, 19, and 20.*—In combination with these powers, provisions are made for effecting improvements. The 10 G. 3. is declared not to be applicable to future entails, thus leaving procedure under it optional under existing entails. The heir in possession having executed improvements either before or after the governing date, shall be entitled to grant, for three-fourths of the sum expended, a bond of annual rent over the estate, to be obligatory during his own life and twenty-five years thereafter. But such annual rent during his own life shall not exceed the interest of the three-fourth parts of the sums expended, and during the twenty-five years after his decease, it shall not exceed the sum of seven pounds two shillings for every hundred pounds of such three-fourth parts. The bond shall not form a ground for the legal eviction of the estate; the annual rent shall be recoverable out of the rents of the estate by ordinary process; the heir in possession shall be bound to pay and keep down the annual rent; and the creditor's powers against the rents of the estate are limited to two years. Heirs of entail may charge the estate by granting over it the obligation technically styled a bond and disposition in security for two third-parts of the sum on which the amount of the bond of annual rent would be granted if calculated in terms of the act; and bonds of annual rent or in security shall operate as discharges of all claims for improvements against the estate and its rents.

*Sections 21, 22, 23. and 29.*—Improvements having thus been provided for, the next group of sections relates to provi-



sions to wives and younger children. The 5 G. 4. c. 87. is declared not to be applicable to future entails. But where provisions to younger children have been made in terms of that act, the heir in possession is to deal with them in the same manner as with monies expended on improvements.

*Sections 6, 7, 9, 10, 11, 25, 26. and 30.* — The provisions, for the more direct interests of the heir in possession, are combined with a series of sections for the protection of creditors. A creditor of an heir empowered to disentail by himself alone, shall be entitled to affect the estate, and have the same rights as if an instrument of disentail had been executed. The debts of the entailer, which affect the estate to be disentailed, must be disclosed; and creditors who, within a year of the disentail, shall adopt the necessary process, shall, notwithstanding it, be entitled to affect the estate. Heirs of entail having, previously to the governing date, borrowed on the security or credit of their right of succession, shall not be entitled to give consents to disentail, but the Court of Session have power, on cause shown, to overrule the opposition of the creditors. And a similar rule applies to heirs apparent under future entails, but not to heirs substitute. The estate charged with the debt may be sold for the payment of it, but the creditor shall not be entitled to sell in manifest excess of what shall be necessary or proper. And where there is a surplus it must be re-invested as under the entail.

*Sections 47, 48, 49.* — As astuteness might devise means, through other forms of conveyance, to defeat the purpose of the statute, provisions are made against such defeasance. It is enacted, that limitations or restrictions by trust deeds or by the constitution of liferents, shall not affect the rights of the future heir: notwithstanding the former, he shall be deemed the proprietor in fee-simple; and, after the passing of the act, it shall be competent to grant an estate limited to a liferent interest in favour only of a person in life at the date of the grant. Nor shall it be competent to insert in any future lease conditions regulating the succession, or abridging the rights of the heir; but the proprietor shall be entitled to enforce any prohibitions or restrictions which

shall have been inserted in the lease for the *bond fide* purpose of protecting his just rights and interests.

*Sections 27, 28, and 29.*—Where money is invested in trust for purchasing lands to be entailed, it is to be dealt with as if it were entailed lands, the date of the trust deed is to be held that at which it should have been subjected to entail, and out of it provisions may be granted to wives and children.

These are the provisions of the statute, which it is important to notice, in so far as the public interests are concerned. There are others of a technical nature, which, although material in the working of the act, it would be out of place to analyse. Throughout the statute the arrangement of the sections and clauses is clear; the series is logical; and the phraseology is precise, and, in general, full without being tautological. Ambiguities, omissions, and similar defects, may doubtless be found when it is subjected to the test of judicial examination; and it would be in vain to hope that, unlike all other great statutory changes, it will escape the evil of creating litigation.

An elaborate exposition of the advantages of this alteration of the law would be superfluous, as the more important of them lie on the surface. In England an analogous system of disentailing has long been practically beneficial; and that now conferred on Scotland is, in some respects, superior, as it leaves the heir of entail at liberty to deal more freely with his property, by leasing and improvements, than is permitted under the restraints imposed in many English entails.<sup>1</sup>

<sup>1</sup> See as to this, the following recommendations of the Committee (H. C. 1848) on *Agricultural Customs*, and *post* : —

“That it seems very desirable to your Committee that estates under settlement should be endowed with every practicable privilege for their advantage which is attached to absolute property; and that persons having limited estates, in addition to the ordinary leasing powers generally conferred on them, should be enabled, under proper precautions, to enter into stipulations of the nature above referred to [for securing compensation for unexhausted improvements]; which at present, it appears, they cannot do.

“That the power to enter into such stipulations, binding on subsequent interests, might be advantageously made a general incident to leasing powers of

Without venturing on precise prediction, we believe that we are safe in saying, that heirs in possession under existing entails will, in many instances, avail themselves of the statutory powers, although, as we fear, obstacles will, to some extent, be interposed by the machinery of the statute to which we will hereafter refer. It is matter of notoriety that many of the proprietors of entailed lands in Scotland are under great embarrassments, arising occasionally from the difficulty of obtaining the means of making profitable improvements, but more frequently from the indulgence of a taste for improvements merely ornamental. The expensive modes of borrowing, which alone were within their power for effecting such objects, increased their burdens in a rapid *ratio*. In many cases a sale of the whole estate, or of a portion of it, has become indispensable; and, in many others, it would be highly expedient. Arrangements for disentailing will, in the ordinary case, be made with little difficulty. When the heir apparent, or the heirs substitute, are the children or other near relations of the heir in possession, it will rarely be for their true interest to refuse their consent. Where they are more distant there may, doubtless, be more difficulty; but means may be devised, not inconsistent with fair dealing, by which their consent may be obtained. The division and transfer of land, which will thus result from disentailing, will produce great and extensive benefits, on principles and through means which are too well known to require especial mention.

Whether the residue of the lands or of the price will be entailed of new, and, if so, under what conditions, must, as yet, be conjectural. Proprietors in Scotland have, hitherto, shown an earnest desire to perpetuate their families through the instrumentality of strict entails; but it is to be hoped that this exclusive feeling may yield to the more enlarged and liberal opinions which now prevail. The futility of such tailzies under the statutory powers of disentailing must, of itself, operate as an effective bar. In all probability, entails

lands in settlement by aid of parliament, and also be conferred on persons having limited interests in land."

A question hence arises, whether such powers should be introduced in family and marriage settlements of land in England.

will, hereafter, be limited to a judicious regulation of the succession and to prohibition of gratuitous alienation, to which provisions no serious objections exist.

In a manner analogous to the effects of the division and transfer of land, the greater facility of leasing and of making permanent improvements will obviously conduce, in a high degree, to the advancement of agricultural prosperity. It has, of late, been asserted that the inferiority of the agricultural condition of entailed estates in Scotland has been exaggerated; but the assertion is refuted by preponderating evidence. The censure is, indeed, admitted to be true, as regards the smaller estates, and it is only in a few very large estates that the condition is said to be equal to that of unentailed lands. The system of leasing for nineteen or twenty-one years (the benefits of which are of general operation), combined with greater means of outlay, may have rendered such estates in some degree superior. But the evidence given before the parliamentary committee of 1828 is in accordance with the knowledge of every one conversant with the details of Scotch agriculture, and amply justifies the position that it is, in unentailed estates of moderate size, that permanent improvements are most obvious.

An important boon is conferred, both on the capitalist and the proprietor, by the statutory system for borrowing on bonds of annual rent and bonds and dispositions in security. As formerly mentioned, it was almost impracticable to effect loans for improvements under the minute and complicated machinery of the 10th of Geo. 3., and the hazards with which it was attended. But the mode authorised by the amending statute is simple and free from risk, presenting no intricacies to the conveyancer, and, in ordinary times, giving a fair return to the lender. The calculation has been made on the principle of securing to the lender the interest during the life of the heir in possession, and of enabling him after his decease to make sure of the payment of principal and interest. Loans of this nature, as they involve a postponed date of re-payment, may not suit private lenders; but we believe that they will be regarded favourably by the great money-lending corporations, which are now numerous and in

keen competition. The bonds being transferable by assignment recorded, they will, in the ordinary state of the money market, be of easy realisation; and as the creditor is vested with the powers attached to the holders of real securities to levy payment of the interest out of the rents, he will be in no danger, with common vigilance, of losing by accumulation of arrears.

The heir in possession is now placed in a position much more favourable than that in which he formerly stood. Independently of the greater ease with which a loan can be had, he is freed from the minute previous procedure, by which much expense and delay were caused, and from the anxious uncertainty whether, from the omission of some technicality, the transaction might not be annulled. An end is put to the difficulties of keeping up the claim against successive heirs; and, in place of a discharge being competent only upon the heir assigning to the creditor one-third part of the clear rents during his life or until payment, a discharge is now obtained by the execution of the bond of annual rent or of the bond and disposition in security. In future entails there will be no difficulty in effecting loans for improvements; for, as under them, the heir may, by himself alone, acquire the estate in fee-simple, the creditor will be entitled to affect the estate itself for the payment of the debt.

We need not dwell on the justice and sound policy of the enactments protecting the interests of creditors, or on the facilities afforded for making provisions for wives and younger children. The disastrous results which the former system produced, in both of these particulars, were amongst its greatest evils.

While such are the benefits which will result from the statute, the question emerges whether greater benefits might not have been conferred by the prohibition of entails for the future, and the creation of compulsory means for the abrogation of those in existence. Both of those remedies, and more especially the latter, are of that strong character which a prudent legislature is reluctant to adopt, unless the necessity be imperative. Both could have been attained with less

hazard than at first sight may be thought. Entails for the future could have been prohibited without the fear of public injury, other than that which some suppose would have arisen from the removal of a necessary support of an hereditary peerage. This difficulty involves a large question, into the discussion of which we do not intend to enter; and we content ourselves with expressing a doubt whether it is not more advisable to leave the members of the peerage to maintain their position by the wise administration of their estates, than to uphold, for their behoof, an artificial system, vicious in itself, and interposing a permanent barrier between their supposed interests and the true welfare of the other classes. It would be more difficult to deal with existing entails without apprehension of injustice to heirs substitute. But their contingent rights can be valued, and the heir in possession, or his creditors, might have been empowered to compel them to accept of the value. In many cases they would have accepted it without compulsion, as it is notorious that heirs substitute under entails have made offer of their reversionary interest for a moderate present payment. In Scotland a large majority of those conversant with the subject would have approved of this more extended plan, had it been attainable. But we believe that there is a prevalent conviction that it would not have been advisable to attempt its accomplishment, as the policy of the legislature is to resist violent changes, and to introduce gradually those reforms of the law by which private rights and interests are to be materially affected. Merited praise has been given to the prudence of the promoters shewn in the limitation of the measure to the amount of improvement which for the present was within their reach.

But with this general approval of the amending statute, we think that it is liable to two serious objections.

*First.* Not only is the statute of 1685 retained in force in so far as it is not repealed, but express reference is made to other entail statutes; while others, which are not noticed, are, by necessary legal implication, left in existence. We are aware of the difficulty of embodying the purport of a

series of statutes in a consolidating act; but it ought to be attempted wherever it is fairly attainable. The Scotch law of entail presented an opportunity for reducing the relative statutes into a code, as they are comparatively few in number, and of no great complication. Not only, however, has this been omitted, but there has been inserted in the amending act a section extending to heritable property in Scotland the enactments of the 39th and 40th Geo. 3., commonly called "The Thelusson Act," the well-known object of which is to prevent the undue accumulation of profits or produce and the postponement of the beneficial enjoyment of them beyond a time limited. This, we think, was not an advisable course. For that statute is purely English, with the corresponding technicalities and phraseology; and it is explained by the judgments of English courts. If questions should arise under this section of the act, the Scotch Courts will be under a disadvantage in construing that statute, and will find it difficult to ascertain whether, or how far, they are bound by the English judgments. The better mode would have been to insert a series of provisions embodying the subject matter of the English statute, but conformably to the rules and phraseology of the law of Scotland.

But, *secondly*, a still more important practical objection is raised by the nature of the machinery for carrying the provisions of the amending act into execution. Almost every step must be taken under the sanction of the Court of Session. The necessity of application to the Court, and of acting under its cognisance, pervades the statute. By that authority lands must be disentailed; sales, feus, leases, and exchanges must be effected; charges and burdens be imposed; bonds to creditors granted, and provisions to children made; and sales of lands by creditors, reinvestment of residue, and trusts for entailing must be executed. Not only is the authority of the Court indispensable, but, in many cases, the necessary deeds are to be executed at the sight of the Court. The administration of entailed estates, except that of the most ordinary kind, is thus committed to the Court of Session.

We deem these provisions to be objectionable. The necessity for application to the Court will have the effect of

barring much useful administration which would otherwise have arisen. There is a reluctance to judicial procedure, and to the inquiries and discussions which it may create; and many persons who might have executed judicious and rational deeds under the statutory powers will refrain from doing so when it is imperative on them to act through the *medium* of a Court of Law. The procedure must be attended with considerable expense, and be subjected to some delay, by reason of the vacations of the Court. It may be open to objection from informality or irregularity. And although there is a limited time within which such objections must be made against instruments of disentail, yet even that time is considerable, and there appears to be no such safeguard for other transactions.

The interposition of the Court might be advisable to some extent in sales by creditors; but in the exercise of all the other powers, the parties, we think, ought to have been left to originate and complete the transaction under the direction of their ordinary advisers. This would, unquestionably, have been sufficient for effecting a disentail, or making a sale or granting a feu or long lease, or imposing a burden. No evil is discernible in the permission to deal thus freely; and wherever there was a wrong done, the Courts would be open for the remedy. One of the strongest objections urged against preceding statutes, and especially the 5th of George 4., is that they laid a foundation for judicial trusts, and the consequent administration of real property through the Courts of Law. It is unfortunate that the evils thus apparent should have been increased in magnitude and force. We deem that it is a truth too plain to require illustration that Courts of Law are instituted for the purpose of enforcing rights or remedying wrongs, and not for acting as the administrators of property.



## ART. V.—LIMITED LIABILITY IN PARTNERSHIP.

*Partnership "en Commandite," or Partnership with limited Liabilities (according to the Commercial Practices of the Continent of Europe and the United States of America), for the Employment of Capital, the Circulation of Wages, and the Revival of our Home and Colonial Trade.* E. Wilson, 1848.

IN the stage of repentance, the fool takes thought of the causes as well as of the consequences of his misdoing, and, may be, resolves upon a future course more consonant with wisdom. It is in this mood of mind that the people of this country are now rampant about reduction of expenditure and of taxation, emigration, banking, and sundry other causes, or supposed causes, of their misfortunes, saving and excepting their own individual improvidences, and their own negligences of duty, the most fruitful and the most universal cause, without which the others would be nearly harmless. As these improvidences and negligences form standing conditions of our nature, statesmen must not on such a plea deny the contributions of reform, which it is their duty, as it is within their power, to bestow; and therefore we presume to suggest one, which, in its practical operation, may be as effectual and as extensive as any. We refer to the Law of Partnership, particularly in reference to partnerships *en commandite*,—an arrangement which is peculiarly necessary at this time for great numbers of commercial persons of the second class throughout the country, for the advancement of business in new and backward places, for the improvement and extension of agriculture, for the extension of traffic in our colonies, and for meeting a desire for change in the shape of socialism and communism, which will become overwhelming here as well as elsewhere, unless means be taken to allow of fit arrangements of an intermediate character.

In considering this subject, it is necessary, first of all, to anticipate or encounter a prejudice which thwarts the appre-

ciation of every novelty where interests are much involved: The supposition that the new thing proposed or advocated will supersede instantly and universally the old things, and supplant all the virtues of the old by all the vices of the new. The different kinds of partnership have their respective advantages, and in recommending any, it is not intended to decry the others where they are available. It is an advantage of a system of comprehensiveness, in law matters as in all others, that it affords to different tastes and to different wants the opportunity of selection and adaptation, of making new modifications and combinations of the means supplied, and of correcting and counteracting the mischievous tendencies of the one, by the presence, suggesting preference, of the other. The new has many difficulties to contend with in struggling with the old, which has full time to prepare for its supercession, and for adapting itself to altered circumstances. It is the office of the statesman and the legislator, taking counsel of the naturalist and the jurist, to remove hindrances to the development of the enterprise of the people, according to their wants and wishes, and to take care that the institutions for the administration<sup>1</sup> of justice do not interpose to prevent the fair and free action of that enterprise,—perplexing it by incongruous and inapplicable doctrines, and restricting it within the competency, most incompetent, of its antique and clumsy machinery.<sup>1</sup> Of such a state of things, partnerships, as established by the Law of England, are striking illustrations; they are yet in swaddling clothes, though of late years, by dint of much struggling, and much hesitating legislation, they have got their limbs somewhat more free.

To the world, though not to England, three kinds of partnerships are known:—

1. In which all the partners are liable, to the whole extent

<sup>1</sup> "Of all the parts of the English legal system, the Court of Chancery, which has the best substantive law, is incomparably the worst as to delay, vexation, and expense; and this is the only tribunal for most of the classes of cases which are in their nature the most complicated, such as the cases of partnership, and the great range and variety of cases which come under the denomination of trust." — John Mill's *Political Economy*, vol. ii. p. 443.; see also this writer's chapter on the subject of this article.

of their fortunes, for all the acts of all the other partners within the scope of the avowed objects of partnership. 2. In which some of the partners (those upon whom the management rests) are liable to the whole extent of their fortunes, while others who take no part in management are liable only to the extent to which they have declared their liability. And, 3. In which all the partners are liable to the extent only of a declared limit, that is, usually, the number of shares which they have taken in the concern.

Of the first kind are all ordinary partnerships of merchants and tradesmen; of the second are the partnerships *en commandite* which exist in France, in Ireland, in some of the colonies, and in the United States of America; of the third are incorporated railway companies, in which the liabilities are expressly limited by Act of Parliament.

In any case the partners may, by contract among themselves, limit their respective liabilities, but they cannot do so as to the world beyond, in regard to their matters of partnership.

The point now in question is, why should not partners be enabled to limit their liabilities as to all the world, as well as among one another? Why, if I join A. in a partnership to deal in tobacco, and so limit the claims of the public upon me as to all his acts which do not concern tobacco, may I not by means equally, or if necessary more public, declare, with practical effect, that I will only be liable to a limited extent for his dealings in tobacco? Why, if I may be a partner in a single adventure, or for a number of adventures, and only responsible for them, may I not be a limited partner to a limited extent of my means?

That we may not come to too hasty a conclusion, let us consider the circumstances under which the different kinds of partnership, and the conduct of business by individuals, are available or preferable, and in some sort the natural history of partnerships — the state of things to which each is appropriate; the objects to which they are applicable; their respective advantages and disadvantages; the modifications of which they are susceptible; the evils which they are calculated to remedy; the objections to the institutions which are

requisite to support and protect them ; and the mischiefs we suffer from the absence of better arrangements in this respect.

Few persons (if any) have all the qualifications and means requisite for the successful conduct of business — the knowledge, the skill, the energy, and the capital ; so that the aid of others, either by means of agency or of partnership, becomes necessary : in large cities, where the division of labour in employments is minute, agency supplies for the most part the requisite desiderata, but elsewhere partnership is the only means. But agency cannot give to the concern that continuity which provides for the sickness, the feebleness, or the desire of repose of the man of business ; hence even in cities, where, in the active periods of life, agency may supply the aid, the full advantages of a partnership are wanting.

When the principal is in full vigour, the advantages of unrestricted volition are such, that if he be a man of intelligence, of capital or the means of commanding capital, and of energy, he prefers, by means of this agency, in the shape of managers, clerks, or assistants, or in the shape of men of business following special divisions, say brokers, warehousemen, bankers, discount-brokers, and others, to conduct his business without the aid of partners ; but as his energy or his interest flags, he feels, like the old bachelor, the need of a partner, and commonly casts about to supply the deficiency. Mayhap, following the parallel example, he takes an old clerk or servant, as the other would do an old servant, in which, though he may gain the advantage of a servile obedience to his will, and a steady following of his directions, he lacks somewhat the energy and intelligence which an earlier or freer choice would give. The case marks at once the necessity of the union, and the inconvenience of deferring it to too late a period. But why is it so long deferred ? for no other reason than that the law, or the administration of it, has made a partnership almost as indissoluble as a marriage, and that, whatever may be the inconvenience attendant upon a choice, perhaps carefully, but unfortunately made, the connection must be endured, or a loss of business, partial or total, be encountered. In most partnership deeds there is provision for arbitration in case of dispute, but the courts on

the plea of dignity, or on the plea that the suitor should have the best adjudication, have refused to give effect to the covenants where one or other of the parties refuses to appoint the arbitrator; moreover, they refuse to administer the business pending the suit, but in most cases insist upon the sale and dissolution of the business, which may have been created by years of anxious exertion, and in which may be involved an immense amount of capital and of credit, the greater part of which will be lost, unless the sale and dissolution be conducted with almost as much care and circumspection as was used in creating the concern, and in bringing it to its present state. The faults or failures may not be of a nature to justify the expulsion of either party from the association, and thus deprive him of the benefits of the partnership, but may only be of such a nature as to call for the judicious interference of an intelligent and disinterested moderator; but no, the fixity and impliant nature of the rules of equity forbid a discriminate and equitable administration of the affair, and the elaborate work of years of enterprise and prudence is sacrificed to the incompetency, the indolence, the servile adherence to precedents, or it may be the selfish folly of the functionaries appointed by the state to give relief, in a matter of almost as much importance, and of as universal concern, as marriage itself.

Following the course of treatment which we have laid down for ourselves, we will for the present abstain from pointing out the specific remedies which are called for, and proceed to discuss the state of things in which the conduct of the business by an individual, or by a private partnership, or by a partnership *en commandite*, or by an incorporated company, is appropriate, and the objects to which they are applicable, and their respective advantages and disadvantages.

In treating of the motives that induce partnerships, we have incidentally referred to the cases in which the conduct of business by individuals is appropriate, and to its advantages and disadvantages. There are no objects to which it is especially applicable. In practice, in this country, professional and artistic business is conducted generally by the individual; but the disastrous consequences in the majority

of instances mark how necessary it is that the law of partnership and its administration should be modified, so as to give to the persons who are dependent on their own skill and energy, the means of mitigating the visitations of sickness, of misfortune, and of premature decay, the fears of which so greatly aggravate the anxieties of life in their case, tend to bring on the very calamities which they fear, and place them at the mercy of the capitalists and of the mere craftsmen, who often realise their fortunes, not by their own skill, energy, and prudence, but by the distresses and undue competition of others, whose lives and fortunes are spent in most arduous and most precarious pursuits, whereon the national welfare depends. Doubtless the irascibility which is incident to great and continued mental exertion, indisposes the intellectual person to be a good partner, and, like all persons unfamiliar with the necessary rules and prudences of business, and sanguine of results, he is apt to form undue expectations, and to conceive himself cheated, where the only cheat has been his own expectations. But still there have been instances where the combination of such intellectual energy and skill, with capital and habits of business, conducted upon regular principles, has been successful, and mutually advantageous to all parties.

We conceive that there is no instance where business can be conducted successfully by an individual, in which it cannot be conducted with equal success by a partnership, and with all the advantages incident to that association. The question then arises, to what state of things are the different kinds of partnership appropriate?

For large undertakings of a public nature, in which the returns are slow and uncertain, and the risk proportionately great, — in which a great amount of capital is requisite, and which, like government works, may be undertaken and carried on by contract, — incorporated companies are suitable. But recent experience has shown, that such companies stand in need of a much higher organisation, and of much more direct responsibilities, than those bodies, so powerful as to over-ride the legislature, have thought fit to impose upon themselves. Now that, however, the shareholders have

come to find that their interests are not identical with the restless energies of the directors and their advisers, it may come to pass, that those guarantees which prudent legislators have in vain endeavoured to impose for the well-working of these companies, will find their best supporters in the shareholders, and even in the directors themselves, who, being shareholders, have interests more permanent than the interests which they derive from their official capacity.

Since the passing of the Joint Stock Companies' Acts, these bodies differ from companies incorporated by act of parliament in this only, that they are liable to the public to the full extent of their shares, and the terms of their existence depend not altogether upon provisions of special statutes made to apply to each case, but partly and chiefly upon the terms of their own convention, or deed of partnership, governed or restricted in some particulars by the general law relating to Joint Stock Companies. This law has failed hitherto from not making due provision for such companies in their provisional state, and from not providing for companies which either wholly or partially failed to adopt the conditions of their existence imposed by statute. When these legislative provisions shall have been supplied, they, like other companies incorporated by act of parliament, will be proper for all cases where great capital is requisite, and the concern does not involve much detail requiring the immediate direction or personal superintendence of the principals, on account of the fluctuation of circumstances to which the detail is applicable. Where the detail is of regular and habitual recurrence, and admits of being reduced to routine, it may, by means of appropriate organisation, be conducted with nearly the same advantage as by private partnership.

The other two partnerships, — private partnerships, and partnerships *en commandite*, — are suitable for business of detail, where close and immediate superintendence is necessary, where the turn of the market requires to be watched, and where the competition is active. The difference is rather in the terms on which the capital is obtained. The latter, especially where the returns are not regular or certain, is peculiarly suited for the union of skill and of capital, which

might be supplied either by individuals or by companies; the former is applicable to cases where the individuals furnish each their share of appropriate skill and labour, either with or without capital, as the case requires.

In agriculture, in professional, literary, and artistic business, the partnerships *en commandite* are peculiarly proper. In every other species of business they are equally applicable in reference to the supply of capital, without skill or superintendence. But since they would, perhaps, interfere somewhat with the freedom and promptitude of volition, by reason of the rules which must to some extent be laid down for the governance of the concern, with a view to protect the interests of the *commanditaires*, or those who do not take an active part in the business, they are not applicable to business dependent on the turn of the market, to the same degree as private partnerships, where all the partners are habitually consulted, and any partner may act. On the other hand, the regularity induced by due accounting, is calculated to give a steadiness to business, and to enforce habits of prudence, the want of which is the great cause of failure among tradesmen generally. Moreover, they would enable many to obtain some share of the profits of business, without embarking in it all their time and labour and skill, which may be more profitably engaged in pursuits to which they are more adapted, and in which they may be more required; while the ruinous competition which results from the present state of things, forcing individuals into trade, as the only means of getting a fair return for their capital, or for the labour and skill combined with their capital, would be in some degree diminished to the benefit of the state generally, and of the individuals particularly.

The objections to partnerships *en commandite* have been, the means which they might afford of enabling partners to obtain a disproportionate share of the profits at the expense of the creditors, whose interests it is supposed are protected by making every person who receives a share of the profits liable to the extent of his fortune, for the debts and obligations of the concern. The denial of this mode of partnership has produced this very effect. Its objects have been attained,



or attempted to be obtained, partly by permanent advances in the shape of outstanding credit from the bankers; partly by loans of a permanent kind from houses with which the concerns have dealings; and partly by loans made by persons holding agencies or clerkships at a disproportionate salary; and by some other arrangements of a similar kind. All these methods operate as drains upon the resources of the concern, at unfavourable periods, expose it to great risk, and operate to defraud those creditors whose relations with the concern are less intimate, and who have not, therefore, the means of watching its dealings, and stepping in to protect themselves by a timely withdrawal. The bankers, through whose hands all the transactions of the concern pass, have the earliest intimation of the state of the concern, and the instances are not rare in which, by sudden withdrawal, they have brought fair concerns to a stand, though generally they are restrained by the fear of that conclusion, and of its tendency, like fire, to extend its ravages to other concerns, and induce general panic or prevalent distress. A chief danger of a modern panic rests here. Depositors are protected from the failure of banks by the numerous shareholders, and the restrictions upon their issues; but the necessity of doing business has engendered this dangerous system of credit by permanent advances, and introduced a new source of calamity.

In each of the instances of evasion above adverted to, the lender receives the full rate of interest, whether the year be good or bad, besides imposing the severest terms in his other relations with the concern; thus draining it when its resources are least available; whereas, in the partnership *en commandite*, where the *commanditaire* receives only a proportion of the profits, varying with the returns, the obligations do not press so severely in periods of pressure. Considered, therefore, as an arrangement of individual concern to the trader, it is by far the most beneficial; to the capitalist creditor not less so, for though in bad years he may receive less, he will be indemnified by the average returns: to other creditors it will not be less advantageous but more; the resources of their debtor will not be so much perilled, as there will exist between them and the common debtor a class of creditors interested in sus-

taining him, and entitled to inspect his concerns, and enforce the proper keeping of accounts and other regularities, by which the prudences of business will be incidentally promoted. Speculation and adventure have ceased to be fair or proper among the general class of traders; they should be confined to the merchant. Hence the most undeviating regularity might be enforced without danger or hindrance to trade. The demands of a district may be ascertained by a very little labour and care, and it is the office of the tradesman to proportion his orders accordingly. The ruinously cheap prices, which cast every thing within the reach of every body, are paid for by national evil and national losses, which bring the actual cost to a remunerative one, that prevents the public from having the article at a really cheap rate, while it fails to bring the remuneration to the right quarter—the producer, the merchant, the tradesman. For the ordinary range of supply, therefore, the partnerships *en commandite* are highly suitable, and if extensively used would be nationally beneficial. The system would steady trade, and yet give to the public those opportunities for commercial enterprise, from the desire for which it is hard to escape in a commercial community, and which is probably necessary to satisfy the gambling propensities of human nature, to afford the excitement of uncertainty, and grant relief from the dead level of certainty.

It is impossible, within the compass of one article, to illustrate the workings of the different methods of partnership which obtain, or the practices which in fact are in vogue.

Partnerships, like contracts, have a tendency to adjust themselves to the occasion which gives rise to them. In different countries, and at different periods, according to the system of economy which has place, they have assumed a different character, both in fundamentals and in details. Examples of every kind may be found in the various countries of the earth, corresponding with the respective conditions of those countries. Except in England, they have not been formed upon any rigid principle, either of jealousy for the interests of the creditor, or of leniency for the interests of the debtor. The difficulty in this country has

arisen from the difficulty of applying to the adjudication of questions of difference, and to the administration of the affairs of partnerships in litigation, the procedure adopted by the courts of judicature. Where the partnerships are numerous, or where the circumstances are complicated, the machinery has been found inadequate; and in order to extricate themselves from the dilemma, the courts have been tempted to adopt, in determining questions, a severity of principle inconsistent with the needful and practical pliancy of partnership arrangements, and have assumed that the parties to such arrangements were actuated by principles to which they have not referred.

Of late years the legislature has attempted to diminish the evil by establishing a system of registration as to joint-stock companies, and by overcoming difficulties incident to the unwieldiness of the societies as regards the rule adopted by our Courts, in matters which come before them, that all parties should have direct notice or directly appear. The laws for this purpose were carried through parliament with difficulty, and, as usual, much valuable matter was lost by the way.

Much, therefore, yet remains to be done; and that cannot be till the principle be established, that any partnership contract, duly registered, shall be binding on the public as on the partner to the contract, so long as the terms of that contract are adhered to; that if the contract be departed from, it shall not be deemed to be abandoned generally; and that the burden of litigation, in respect of such contract, shall fall on those who have deviated from its terms. The courts should be required to give effect to the stipulation, for referring matters of difference to arbitrators; and, in aid of that purpose, a court of arbitration should be established in connection with the machinery for registering partnerships of every denomination; and for the maintenance of such courts in an efficient form, there might be imposed, in respect of an annual certificate of registration, a small stamp duty. Such a court of reference should exist in subordination to the higher courts, and be aided and supported by them.

The principle of special courts for matters of peculiar difficulty and pressure, and intrusted with a relaxation of the

strict rules of the courts, has been well established; and by judicious arrangements may be made to work well with courts of general jurisdiction, whether imperial or local — a point to be specially aimed at, for the avoidance of injurious conflict.

By far the most efficient results would be obtained by the publication of the proceedings of the office for the registration of partnerships and of the adjudication of questions that would necessarily arise in the administration of the law: a means of producing the desired effects of legislation without direct enactment, which ought to be resorted to more generally in a country where the universal tendency is to resist the imposition of law, even for the public benefit, unless the evil be of great magnitude, and then seldom in an efficient form. The constant publication of cases of mischief and of the inoperativeness of the law, would inform the public how much of the evil might be remedied by their own precautions; how much more might be accomplished by their moral influence; and how much it is indispensable for the legislature to effect by its interposition.

In the present case such cautious treatment is peculiarly necessary; *à priori* legislation, unaided by the convictions of the people, would prove abortive, unless it were confined, as it ought to be, to furnishing the means for enabling the public to act upon those convictions in their private arrangements, — that is, by means of registration; by means of ready tribunals for the adjudication of questions; and by means of an appropriate court for the administration of partnerships *pendente lite*, in those cases in which the absolute dissolution, and sale of the property and effects of the partnership, and winding up the concern, would be attended by ruin, or by consequences disproportionate to the occasion.

The recent legislation which has enabled the Court of Chancery to interpose in the case of joint-stock companies, might be made more generally available; but till the subject had been well worked out, it should be assigned to a special court, formed somewhat on the plan of the Court of Bankruptcy, but aided by officers authorised in special cases to inspect the conduct of the business, with prompt powers of reference to some competent referee, to determine by ques-

tions, and exercise the discretion which must be invested somewhere. That such a jurisdiction would be difficult and embarrassing there can be no doubt, and most difficult and embarrassing at the outset; but it should not be denied. Experience would diminish these incidents, and suggest the limitation of interference. Nothing can be so bad as the present position of affairs, which in the delusive expectation of protecting creditors, opposes hindrance to the best and most prudent means of enterprise, because in a proportion of cases there may be failure or fraud; instead of counteracting such tendencies by special means, that will not defeat the main object, and contrary to the general policy of the English law, which is to allow free action, and to visit irregularity by punishment or retribution. Doubtless the parties, by whose fraud or negligence or want of skill, the interference of the court is rendered necessary, ought to bear all the costs and other consequences; but it is on all grounds unwise and unjust to establish a system of denial of justice on account of the incompetence of the court and its machinery, rather than to remove, by continual efforts, the causes of incompetence, the best means of which cannot be discovered but by continual struggling with difficulties.

In supplying such a special tribunal it is not necessary that new functionaries should be created. Some of the existing functionaries might be put in a new attitude; so organised and so disposed that their attention and their efforts may be concentrated upon the subject matters of their jurisdiction, and that the proceedings may not only be fully and distinctly recorded in an accessible shape, but the attention of the public may be directed to them.

The work<sup>1</sup>, the title of which is prefixed to this article, contains striking remarks on the importance of the Partnership *en commandite*, and an appendix, comprising copious statements of the views upon the subject entertained by leading commercial men, bankers, and lawyers, together with full details of the requirements of a law for realising this description of partnership. Its illustrations of the necessity

<sup>1</sup> We are indebted for this work, we believe, to Dr. Shelton Mackenzie. —  
Ed.

of some remedial process by which small people may make head against the monopolising tendency of powerful firms, and of the suicidal results of such monopolies, examples of which are familiar, in the recent bankruptcies of merchant princes, who were wont to be our boast and our pride, fortify the principal suggestions, and deserve peculiar attention. In truth our strength lies not in a few splendid houses absorbing all trade, but in the multitude of smaller energies and industries pervading the nation and its dependencies. The opening of trade since the war has had the effect of paralysing the established houses of the provinces, whose fixed engagements rendered them unfit to cope with the freer enterprise of fresher and more active competitors. If the law of partnership *en commandite* had existed, they might have transferred these fixed engagements to *commanditaires* and encountered the competitor with greater strength and ability — the strength of established credit, and the ability resulting from better experience of the field of enterprise. As it is, one after another has fallen, and hundreds are destined to fall, if the legislature do not interpose by relaxing the severities of our system of partnership. To us the consequences appear appalling. We cannot but look upon the destruction of houses of good credit with the fear that our middle class may lose much of its respectability. A succession of hot adventurers, starting without capital, character, or credit, dashing on for a few years in a showy run of business, and flying at last to the Court of Bankruptcy for relief from overwhelming obligations to begin again in a like career, will go far to destroy our commercial position, and our political position also, for with the loss of personal credit must come a spirit of adventure in public affairs which will render all things unstable.

The rapid processes for the recovery of debts, and for the relief of insolvents and bankrupts, together with the fast doings of all kinds, make it peculiarly necessary that all honest and well-intentioned houses, that are not yet despoiled by the ruthless and unscrupulous course of competition, should be enabled to protect themselves, as best they may, by proper partnership arrangements. The *laissez faire* principle applies

here with peculiar force. It is not asked that the legislature should create new rights or abrogate old ones, but simply to enable the public to make what conventions it can or will, and then to afford the proper judicial and administrative means of realising and enforcing these conventions, even although it should be to fly in the face of some doctrines or practices of Courts of Equity.

It matters, however, very little to the commercial people what the cause may be; they find their energies trammelled, and are struggling to escape. It pleases them to think that by reducing the State to their own poor condition of helplessness they will obtain their object; but probably, after having weakened their institutions, they will discover that they should have strengthened where they have crippled, and that it would have been better to tax themselves to find the means to unloose their legal trammels than to spend so much effort in destroying the consequences of past abuses—universally admitted, universally repudiated, and suffered to exist, only for the life of present possessors, for the sake of that principle of security with which we have hitherto invested, not only the rights of property, but the rights of industry. We believe that the amendment of the law of partnership, and the means of administering that law, would, having reference to its effects on the energies of the people of this kingdom and its dependencies, be of far more importance than even any reduction of taxation and expenditure which we can make during the present generation. We say the Law of Partnership, and the means of administering that law—not a dry act of parliament, but the practical sanction which it obtains by the aid of Courts of Judicature acting promptly and wisely upon principles founded on the nature of the engagements, as determined by the exigencies, of the people. The legislation of the past session has given practical means of working such matters to some and a great extent, but the principle is either wanting or not yet declared; and we repeat, till partnerships (partnerships *en commandite*) can be freely made, with the full sanction and recognition of the legislature and the courts, this well-spring of wholesome commercial energy will not flow rightly.

ART. VI.—THE PROVINCE OF THE BAR IN ENGLAND.

[The present forms but one of a series of articles which we hope on future occasions to resume, on the subject of the *Laws, Regulations, and Usages practically affecting the English Bar.*]

UNLIKE the system that prevails in most of the states on the Continent<sup>1</sup>, the institution of the Bar in England is for the most part based on no positive law. There are not even, as in the case of other vocations in this country, acts of parliament prescribing any particular qualification for a barrister; nor are the Inns of Court, with which the order is so closely identified, legally regarded in any other light than as *voluntary societies*, the origin of which it has been said no where precisely appears.<sup>2</sup>

Our common law is deemed to confer on the presiding officers of all Courts of Justice the right of regulating the admission to practise in them<sup>3</sup>, in accordance with which general authority the Superior Courts at Westminster have for many ages given exclusive audience in all proceedings before them, not conducted by the parties in person, to members of the Inns of Court of the degree of barrister or apprentice<sup>4</sup>; and the legal recognition of barristers of the Inns of Court, as a privileged order, can be traced in numerous statutes, authorities, and text-books, which, in the course of these observations, we shall have occasion to refer to; and there is evidence of the direct interference of the Crown in furtherance of the system in early times, in the instance of the precept directed to the Judges at Westminster as to the selection of *apprentices* and *attornies* in the reign of Edward I.<sup>5</sup>, and in the case of the rules from time to time made

<sup>1</sup> See as to this Domat, Droit. Publ., liv. ii. tit. 6.

<sup>2</sup> Per Lord Mansfield in *Rex v. Grays Inn*, Dougl. 354.

<sup>3</sup> *Collier v. Hicks*, 2 B. & Ad. 663.

<sup>4</sup> Per Lord Tenterden, 2 B. & Ad. 663.

<sup>5</sup> Precept de Attornatis et Apprenticiis, 1 Rot. Parl. 84.



by the Chancellor, Privy Council, and Judges, for the regulation of the Inns of Courts, of which the Judges at Westminster Hall are *ex officio* the visitors.

The concurrence of barristers in the Superior Courts appears to have been at a very early period required, not only in the advocacy of causes *vivâ voce* in Court, but also in drawing the written pleadings when they ceased any longer to be delivered *ore tenus*.<sup>1</sup> We know, indeed, that in all the institutions from which our own have been imitated, similar regulations prevailed: the rights, privileges, and duties of advocates being laid down both in the code of Justinian<sup>2</sup>, and in the records of those northern tribes whence our forefathers are said to have migrated.<sup>3</sup> In our own statute book, barristers, as a recognised order of practitioners, are repeatedly mentioned under the term of *conteurs et sages gents, narratores, pleaders, apprentices, &c.*<sup>4</sup>, the most eminent of whom were, agreeably to the genius of the feudal institutions of the Normans, enrolled as officers of the Crown, under the name of *servientes ad legem*.<sup>5</sup> Whether, however, as serjeants, or merely as barristers or apprentices, the class of whom we speak have for many ages been known as the Bar of England<sup>6</sup>, whose well-established privileges arise in their character of *advocates, chamber counsel, or draftsmen*, which privileges may perhaps now be regarded as confirmed by statute law, the 9 & 10 Vict. c. 54., which put an end to the exclusive privilege of the serjeants, having distinctly recognised the right of barristers-at-law to "practise, plead, and be heard," in all the Courts at Westminster Hall.

The province of barristers in the Courts at Westminster, as recognised by the statute just alluded to, consists at the

<sup>1</sup> See the authorities cited in Stephen, on Pleading, Appendix, note 8.

<sup>2</sup> Lib. iii. tit. i. c. 14. § 1.

<sup>3</sup> Heinec. El. Jur. Germ. lib. iii. tit. 2. sect. 82, 83.

<sup>4</sup> 33 Ed. 1. st. 3. See Bract. 372 b. 412 a.

<sup>5</sup> See Manning's Serjeant-at-Law, 192., and cases there cited.

<sup>6</sup> Though advocates in the Ecclesiastical and Admiralty Courts at Doctors' Commons, and the Courts of the two Universities may, by their acquirements, talents, and worth, be justly entitled, in common parlance, to rank as Members of the *English Bar*, our observations are necessarily confined to the Bar of Westminster Hall, i. e. of the four Inns of Court.

present day, and has for many ages consisted, in practising, pleading, and being heard there in all proceedings in which the parties do not appear and sue or defend in person.

It is easy to trace, in the various cases reported in our earlier authorities, the year books, &c., on the subject of *maintenance* and *champerty*, the gradual alteration of the system by which the counsel in a cause was immediately retained by the suitor, personally consulted by him previous to and at every stage of the cause, and in all cases of difficulty (whether the subject of litigation or not) to that far more convenient arrangement, existing at this day, by which an attorney or solicitor is invariably required to act as the medium of communication between a private individual and the counsel who is retained to act for him.

The statute 33 Edward I. st. 3. enacts that "none of our Courts, of *pleaders*, *apprentices*, *attornies*, &c., shall take any plea or suit to *champerty* or *maintenance*;" and in the year book, 11 H. 6. fol. 10 and 11., the distinction is taken between the case of a *man of law* giving counsel to the party, or being a counsel with him in a trial (which was deemed justifiable), and the *giving his proper money* for maintenance (which was not so); and we find the exclusive exemption from the laws against maintenance, of *counsel taking fees for their advice and assistance*, repeatedly recognised in the authorities.<sup>1</sup> The system thus recognised no doubt encouraged the very objectionable practice of counsel personally meddling in their clients' affairs, and performing a great portion of those duties which now devolve on attornies and solicitors; and we have some evidence of this in the rules for the *government of the Inn of Courts* made as far back as the reigns of Phillip and Mary, and of Elizabeth, for the prevention of members practising as attornies or solicitors—rules which have, in some instances, been since practically enforced by *disbarring* and *expulsion*.

Not very long after these rules, with regard to the Bar, were laid down, the other branch of the profession came

<sup>1</sup> See 2 Inst. 564, and Comyn's Digest and Viner's Abridgment, tit. *maintenance*, and cases there cited.

under more systematic regulations. Attornies and solicitors, who seem from a series of legal decisions and old rules of Court to have been formerly objects merely of coercion and penal enactments, were recognised by statute, raised into the rank of a liberal profession, invested with peculiar privileges, and placed under systematic regulations, calculated most materially to enhance the respectability of the vocation.

The barrister of the present day practises in transactions, out of Court, as a chamber counsel, conveyancer, pleader, or draftsman, and in Court as an advocate. We purpose now to see what is the legitimate province of the barrister in these departments under the existing system. That portion of the *practice of the law* which devolves on barristers, consists in counselling or advising parties previous to and during the progress of litigation, in disputed as well as amicable legal arrangements, and in drawing or settling such difficult legal documents as are beyond the skill of those who have not paid equal attention to the more profound branches of the legal science. With respect to pleadings, the sanction of a barrister, we have seen, by our common law was required in every case where the proceedings were in any other than the simplest or most ordinary form, a faint trace of which still remains in the rules requiring the signature of counsel to special pleadings in the Common Law Courts<sup>1</sup>, and to a large proportion of the pleadings in Chancery, where counsel are expressly prohibited from putting their hands to pleadings unless drawn or settled by themselves, and made responsible for the contents.<sup>2</sup>

The barrister, by devoting himself at an early period of his professional career to some one branch of the science and practice of the law, has facilities for making himself perfect in his particular department which are almost out of the reach of the general practitioner; and he moreover avoids the

<sup>1</sup> See Tidd's "Practice," p. 724, ed. 8. The Rule H. T. 2 W. 4. dispensed with the signature of counsel to pleadings *concluding to the country*; but pleadings concluding with a verification all require the sanction afforded by a barrister's signature, with the exception of a few of very ordinary occurrence, *e. g.* plene administravit comperuit ad diem, nul tiel record, &c. See *Reed v. Spurr*, 2 Mees & W. 76.

<sup>2</sup> See Beames' Orders, 82, 83, 165, 166. Monro's Acta Canc. 732.

distraction of a multiplicity of vocations, and, that much more perplexing interruption to studious investigation, *the getting up the facts*, the wholesome practice being now rigidly adhered to, that this duty shall always devolve upon attornies and solicitors, from whom alone professional etiquette declares that a barrister can receive his instructions.

The occasions on which, during the progress of litigation or the conduct of a law transaction, the interposition of counsel is at the present day usually called in, must necessarily depend on the discretion of the party himself, or his immediate adviser, the solicitor. With the view, however, of keeping each branch of the profession within its proper sphere, preserving upright practice and decorum, and insuring responsibility—the *responsibility to public opinion* and the Courts, without whose countenance no member of the Bar can expect to succeed—it has long been a professed object of the Inns of Court that the practice of the law by members of the Bar should in every case, as far as possible, be exercised under the surveillance of the Judges and the profession; and that no one should directly or indirectly act in the capacity of a barrister without undergoing the wholesome ordeal of a regular probation, and the subsequent ceremony of being *publicly called to the Bar* by the Inn of Court to which he belongs. Improvements in the system of education in these societies we have repeatedly and earnestly advocated; but the advantages which are even now derived from the public scrutiny directed towards the Bar, as a body, in the practice of the several departments of the law, are too obvious to be conceded to any arguments drawn from other considerations.

The ancient *degrees of the law* mentioned by Lord Coke (not including attornies or solicitors), are *mootmen* (or students), *utterbarristers*, *benchers*, and *serjeants*<sup>1</sup>; and, until a very recent period, no one (except in the character of an attorney or solicitor) was admitted to practise, plead, or be heard in any proceedings arising in the Courts of Westminster Hall, without taking the degree of *utterbarrister*,

<sup>1</sup> Preface to 4 Rep. 19.

which, by bringing him into constant contact with the other members of the Bar, and under the direct surveillance of the Bench, served as a special guarantee for his upright conduct and professional decorum.

At the present day, the *Law List* contains the names and addresses of a very large number of *benchers*, *Queen's counsel*, *serjeants*, and *utterbarristers*, and a far greater number of attornies and solicitors; but it also includes a third or intermediate class, under the designation of *certificated conveyancers* and *special pleaders*. The legal existence of this class of practitioners seems not to have been directly recognised previous to the 44 Geo. 3. c. 98. s. 14., which allowed them to practise, as an eminent special pleader remarks<sup>1</sup>, "rather for revenue purposes than upon any principle of sound policy;" and, from that period to the present, contrary to the policy of the ancient institution of the bar, and the professed object of the modern regulations with regard to attornies and solicitors, a system which has been thus stigmatised by one of its own disciples, has been protected, and even directly encouraged, by the legislature, by the stamped certificate to practise being now declared as a qualification for official appointments equivalent to a public *call to the Bar*.<sup>2</sup>

Whilst we make these observations, we are well aware that, by the existing rules of the Inns of Court, no member can receive the *benchers' sanction* to practise as a conveyancer or special pleader until he has kept twelve terms, or, in fact, *the same number that would entitle him to be called to the Bar*; and we are also aware that, under the present system (the evils of which we are denouncing), many eminent special pleaders have risen into public notice, who, it is argued, would not have had the same opportunity if they had not been allowed to practise before they were called to the Bar. Admitting the rule first alluded to to be effectual in excluding objectionable persons from practising, and further admitting (what we have a very considerable doubt of) that the present system creates more adepts in the "laudable science" of

<sup>1</sup> Chitty's General Practice, p. 34.

<sup>2</sup> See *inter alia*, the 9 & 10 Vict. c. 95. s. 9.

special pleading than could exist after the abolition of the *certificate* system, we are prepared to contend that the evils of this system are of too serious a nature to be upheld by any such considerations, and that the sooner the impolitic imposition is abolished, from which this petty revenue is derived, the better.

It is said, in the first place, that the act of parliament, by which a mere member of one of the four Inns of Court becomes *de facto* entitled to a stamped certificate to practise as a conveyancer or special pleader (to practise, in fact, in some of the most difficult branches of the legal science), is inoperative. To sustain such an argument, it must be assumed that a mere by-law of a corporation—nay, a rule of a voluntary society—shall have the effect of defeating the express provisions of a public general statute. If the rules of the benchers have not this effect, and if (as we certainly believe, and as we find to be the opinion of others<sup>1</sup>;) these rules are not binding, even by way of a condition assented to on becoming a member, inasmuch as they are in restraint of public rights, their real obligation is only on the man of honour; and there is nothing to prevent persons possessed of less punctilio from availing themselves of the proverbial laxity of the Inns of Court regulations, to obtain admission for the mere purpose of insisting on the privilege conferred by the stamp laws.

Even under the present system, however, supposing the rules of the Inns of Court to be completely effective, and that no one can practise as a conveyancer or special pleader who might not, if he wished it, have been at once publicly called to the Bar, what apology is there left for a system which admits of men of precisely the same qualifications, and after precisely the same ordeal, being in one case enrolled among an order of men the most punctilious as to etiquette and general conduct, restricted by known rules and usages as to their practice, their fees, and their general conduct, and

<sup>1</sup> In an article on "Special Pleading and Special Pleadings," in the *Law Magazine* of November, 1847. vol. vii. p. 85. N. S.

in the other case systematically infringing almost every rule and usage recognised by the Bar.

We speak plainly, though we should much regret giving offence to *gentlemen practising under the Bar* by these observations; but it appears to us that a system which allows of men of the same rank and standing, in one instance working hard for a remuneration much smaller on each separate occasion than an attorney or solicitor, and in the other case being stringently bound by a *minimum* of fees, is calculated in itself to produce extreme inconvenience. To find an eminent special pleader laboriously *drawing* for seven shillings and sixpence what the merest tyro at the Bar dare not receive less than half a guinea for *signing*, has something in it more than ridiculous. But are there no other inconveniences following from this practice? If the attorney goes, as he has a right to do, to the cheapest market, and generally, if not uniformly, consults his *pleader* during the progress of a case, instead of the counsel who is afterwards to argue it in Court, can the latter be expected to be as prepared for difficulties and objections at the trial or hearing as if he had had his instructions weeks before, instead of on the eve of trial? If such means are taken to make the department of mere pleading a separate vocation, can any surprise exist that so much mere technicality exist in the profession, or that ignorance of its practical rules is sometimes found in barristers of the highest order of talent?

If there is any force in these observations with respect to certificated special pleaders employed and consulted by the Attorney, need we say a word as to the certificated conveyancer, who can hardly have any other motive for not applying to be called to the Bar, than that he would not then be able to practise in *competition with* the attorney.<sup>1</sup> This latter

<sup>1</sup> It is fair to say, that there are some most respectable exceptions. (See Lord Londonderry's *Memoirs of Lord Castlereagh*, vol. i.) The class as a whole is, however, not altogether worthy. At the same time, let not the attorney be too rampant on this score, as it might easily be shown that, until recently, conveyancing business was not at all within his province. Let us, however, confess that many of them are now exceedingly well informed in this department of

class, however, the attornies and solicitors have been strong enough in a great degree to do away with. We should certainly hail with satisfaction the total repeal of these regulations by which a mere stamped certificate legally confers the right of practising in the profession of the law ; but, until the government can be induced to give up this paltry source of revenue, it appears to us that no valid reason exists for continuing to hold out direct encouragement to the class of *certificated* practitioners, to the prejudice of practitioners at the Bar or the solicitors. No *vested rights* of the class are likely to be attacked, but surely, if the above remarks are not wholly erroneous, neither the judges or their subordinate officers the taxing masters should sanction (what we believe the present practice of taxation of costs does) a system, the alteration in which is by no means calculated to injure any individual, though it would most materially benefit the profession as a body.

We have thus regarded the privileges of the Bar as chamber counsel and draftsmen : it remains to say a few words with respect to their privileges as advocates.

In the superior courts at Westminster it has been already observed, barristers of the Inns of Court are exclusively heard where parties do not sue or defend in person, no exception being made (except by favour) in the case even of doctors of laws, Irish or Scotch advocates, &c. In the courts of the Counties Palatine and on circuit the same rule appears to have been always adhered to ; but in inferior courts, probably in accordance with the common law principle recognised in *Collier v. Hicks*<sup>1</sup>, we often find a different system prevailing, — the presiding officers recognising, from necessity's sake in remote districts, where a regular *Bar* could not be expected to attend, attornies and solicitors, or occasionally other persons in the character of advocates, and in one or two instances, as the Lord Mayor's Court in London, or the

the law. If, instead of being adjutative (as now they are) to the necessary reform in our law of property, the attorneys proved an obstructive class, this would be a matter of regret. As it is, we are well satisfied that things should remain as they are. — Ed.

<sup>1</sup> 2 B. & Ad. 663.



Palace Court at Westminster, a limited number of counsel only are allowed.

Of these last exceptions to the ordinary rule it is not our purpose to speak, the general privilege being affected by special customs, charter, or patent; but the general right of the Bar to pre-audience or exclusive audience in all regularly constituted courts of justice in this country, we conceive to be well founded on established principles of policy and general convenience.

Barristers of any of the four Inns of Court, we conceive, must be deemed at the present day to have *de jure* the privilege of *audience*, and a right to act as advocates in all courts where neither a contrary immemorial custom, as in the Ecclesiastical Courts, or an act of parliament, as in the case of the Revising Barristers' Courts, prevent them: for their rights having been for so many ages recognised by the Judges of Westminster Hall, whose peculiar province it is to declare the rules of the common law, must be deemed to receive the sanction of the common law itself, and, wherever the general privilege of having advocates or counsel is recognised by law, barristers of the Inns of Court are deemed the legitimate class to fill that character.<sup>1</sup> Have then any other besides barristers of the Inns of Court, or doctors of law in the Ecclesiastical Courts, the recognised character of advocates in this country? Has any individual not belonging to the order of advocates known to the law the rights or privileges of an advocate in any court of law, further than *pro hac vice*, except where a contrary immemorial custom, or an express act of parliament has conferred this right? We think the direct contrary may be assumed from reference to the course of legislation on this subject, as well as from the very few cases where the question has been raised.

In some instances of modern statutes, indeed, attornies and solicitors have been expressly recognised in the character of advocates, *e. g.* the Bankruptcy Court Act<sup>2</sup>, whereby attornies

<sup>1</sup> See, *e. g.*, the Prisoners' Counsel Act, 7 & 8 W. 4. c. 114. s. 2. See *Newton v. Constable*, 2 Queen's Bench Reports, 157. See also *Barclee's case*, 2 Sid. 101.

<sup>2</sup> 1 & 2 W. 4. c. 56. s. 10.

and solicitors were empowered to appear and plead in bankruptcy proceedings *without employing counsel*, and the Prisoners' Counsel Act, which gives attornies the privilege of examining and cross-examining witnesses on summary proceedings before justices of the peace.<sup>1</sup> It is worthy of remark, that the above provision with respect to proceedings in Bankruptcy is now repealed<sup>2</sup>, and that it may still be a question whether attornies, or, in fact, any other class of persons besides Members of the Bar, are strictly entitled to appear and act as advocates before the bankruptcy commissioners. Certainly some abuse of the right conferred on attornies and solicitors, both by this Bankruptcy Act and by the recent Small Debts Act<sup>3</sup>, appears to have sprung up by the system of attornies, who are not employed at all in that capacity, assuming to act *merely as advocates*, regularly receiving briefs from other attornies, and, as it would seem from several cases which have occurred in the County Courts, designedly avoiding both the duties and the responsibilities which the character of attorney in a case imposes.<sup>4</sup> Now, however motives of expediency or economy may justify attornies and solicitors, or even unqualified persons, being permitted by a court on a given occasion to act *pro hac vice* as advocates for their own immediate clients, it may eventually be of far more consequence than it at present appears to the English Bar, if these courts should have the effect of gradually encouraging an undisciplined and irregular order of advocates, who like the *avocats* so generally to be found on the Continent, unite the very distinct functions of counsel, attorney, notary, &c., and thus most effectually fail in acquiring eminence in any, or in receiving that respect which is either bestowed on the barrister or the solicitor in this country at the present time. In the County Courts, which are of such recent establishment, the inconvenience of the practice of allowing other

<sup>1</sup> 6 & 7 W. 4. c. 114.

<sup>2</sup> 6 & 7 Vict. c. 73. schedule 1.

<sup>3</sup> 9 & 10 Vict. c. 95. s. 91.

<sup>4</sup> See a case of *Davies v. Jones* reported in the *County Courts' Chronicle*, vol. i. p. 170., where Mr. *Johnes* the Judge is reported to have remarked on the circumstance of *services* of notices having failed in consequence of the attornies stating that they merely appeared as advocates in the cause.

than barristers to act as advocates is only beginning to be felt<sup>1</sup>; but even if the attorney who acts in that capacity be *bonâ fide* employed as attorney for the party, the inconvenience must continually occur of his advocacy being a mixture of facts, statements, arguments, and hearsay<sup>2</sup>, producing even worse consequences than where parties act in their own behalf, as the bias of direct self-interest is too obvious to mislead.

The great increase of numbers in the class of barristers, the improvements which are at length commencing in their system of education, and the facilities of communication by which the regular attendance of a competent number could be secured in the most remote parts of this country, if a necessity for those services existed, render it more than ever impolitic to encourage the establishment of any inferior order of advocates. In some instances at *Quarter Sessions* a step in the other direction has been made, and the Court of Queen's Bench have refused to interfere with an order of magistrates giving exclusive audience to barristers<sup>3</sup>; and even in the County Courts a struggle of the same kind has been made, hitherto without success.<sup>4</sup> The impolitic attempts of the legislature to discountenance the attendance of barristers in any tribunals have, in fact, usually failed. Witness the system in the Registration Courts, where, though *barristers* are expressly exempted from practising, *special pleaders* are constantly retained, and the practice under writs of trial, where parties usually prefer having the assistance of counsel at their own expense, to their case being conducted either by themselves or by their attorneys.

There are, of course, cases where the confidential attorney or solicitor of a party, both from motives of economy and

<sup>1</sup> See the case cited in last note, and see also Cox's County Court Practice, p. 275.

<sup>2</sup> In more than one recently reported case in writs of trial from the superior courts, where attorneys have acted as advocates, a new trial has been granted, because the attorney also acted as a witness. See *Stones v. Byron*, 16 Law Journ. 32. *Q. B. Dunn v. Packwood*, 2 New Pract. Cases, 65.

<sup>3</sup> *Rex v. Justices of Denbigh*, 1 New Magistrates' Cases, 547.

<sup>4</sup> See a report of several cases of this kind in the *County Courts' Chronicle*, vol. i. p. 191, 268.

otherwise, is not only competent, but better adapted to the conduct of his case than a barrister ordinarily is; but, wherever he does so appear, he should consistently maintain his own proper character and position. An attorney has not, any more than an ordinary agent, a right *de facto* to act as *advocate* for his own client<sup>1</sup>; nor does any act of parliament that we are aware of confer this right. The Prisoners' Counsel Act, as we have seen, merely enables the attorney of the accused to examine the witnesses. The Small Debts Act only enables the attorney to appear for the suitor, *qua* attorney<sup>2</sup>; and the provisions of the Bankruptcy Court Act on this subject we have seen are repealed.

If, then, an attorney or solicitor has not even a right to advocate the case of his own principal or client, his authority to act in the mere character of advocate rests on a much weaker foundation. We conceive, that, however for convenience sake the litigant or the defendant in an inferior court may on a given occasion have his case advocated by his attorney, and however the judges may by a peculiar indulgence hear at chambers a certificated *special pleader* on a summons which assumes to bring before them the party, his attorney or agent, it should never be lost sight of that the privileges, functions, and duties of advocates, pleaders and counsel, by the common and statute laws of this country, all come within the exclusive *province of the Bar*.<sup>3</sup>

<sup>1</sup> See Lord Tenterden's observations in *Rex v. Borron*, 3 B. & Ald. 438.

<sup>2</sup> 9 & 10 Vict. c. 95. s. 91.

<sup>3</sup> We have thus opened a subject which, if we mistake not, is likely to occupy much of the attention of the profession. There seems to be a conflict of judicial opinion in England and Ireland as to whether a barrister, after practising as such, by serving articles while a barrister, can become an attorney, although he was disbarred before the application. In England the Court of Queen's Bench has decided that he cannot. *Ex parte Bateman*, 6 Q. B. 353. In Ireland there is a very recent decision to the contrary; and we are informed, while we are discussing this question on this side of the globe, it is curious that it is now occupying the attention of the bar and the public of New South Wales, where a bill for the amalgamation of the profession, as it is called, had on our last information (May 17.) all but become the law of that large colony. The debate in the Legislative Council on the second reading of this bill is not uninteresting to the mother country, as we find it reported in the Sydney "*Morning Herald*" of the 26th of April:—

"Mr. Wentworth said, It would be remembered, the bill, of which he was

## ART. VII. — ON THE RIGHTS OF PROPERTY CONNECTED WITH RAILWAYS.

### No. I.

**WITHOUT** giving in our adhesion to the doctrine that to railroads, and railroads alone, the great constitutional changes

about to move the second reading, was brought in last session pursuant to the recommendation of a sub-committee, to whom was referred a bill brought in by Mr. Brewster, the object of which was to, what has been termed, amalgamate the two branches of the legal profession. The Committee found that the bill opened up a much larger field of inquiry than they had time to go into, and they therefore confined themselves to one branch of the subject, and this bill was the result. Instead of amalgamating the profession, as had been proposed, the Committee recommended, that, as there was at times considerable difficulty in procuring the attendance of barristers at the Assizes and Quarter Sessions, attorneys should have the privilege of acting as advocates in these Courts; and the first clause of the Bill was framed in accordance with that recommendation, reserving, however, the privilege to criminal cases. It had been stated, when the Bill was previously before the House, that it was not the intention of the Committee that there should be this restriction, and that he had mistaken the intention of the Committee, who intended that attorneys should practise in civil as well as criminal cases. If this were so, it was an error that could be easily amended in committee, and the right extended to all classes. The second recommendation was, that youths educated in the Colony should have the power of being called to the Bar without going to England: this he considered the most important clause, and one highly conducive to the interest of the Colonial youths. The third object was, to give to attorneys admitted in the Colony, and who have hitherto had no power of electing to which branch of the profession they will belong, the right of being called to the Bar. The reason why this privilege was not given to English attorneys was, because they might, if they pleased, have elected to become barristers, and they did not do so, while the Colonial attorneys had no such advantages. The next clause referred to the examination persons were to undergo before being called to the Bar. Another feature in the Bill was, to render it competent for any barrister to be disbarred and admitted as attorney. It had been said that this was unjust, as English attorneys were not to be admitted to act as barristers, and he thought there was some force in the objection; as there was also in another that he had heard, that to admit attorneys to act as advocates in the Quarter Sessions would preclude barristers from acting there at all, for the attorney will be able to consult and look after his client, while the barrister can have no communication with the client except through the attorney, who may himself act as advocate. It would be seen that there was a great difference between the provisions of this Bill and one for amalgamating the profession. The principal argument that was made

which have happened on the Continent are to be ascribed, we think it highly probable that they have had some effect in

use of in supporting that Bill was, the great saving of expense there would be in consequence of its being only necessary to employ one person instead of two, and undoubtedly if this saving of expense would take place, it would be a reason for preferring that measure; but so far as the evidence of the older and more respectable members of the profession went, it was shown that no such benefits would accrue, and that when, as was formerly the case, the profession was amalgamated here, the bills of costs were as large as they are now. It was also shown by Sir Alfred Stephen, that in Van Diemen's Land, where the profession is not divided, the expenses are not smaller than they are here, and, in fact, there would be no such reduction in the expense as was anticipated. It did not follow, that because a person was competent to act in both divisions of the profession, he was to be paid for acting only in one, and the evidence showed that he would be invariably paid in both—he would be paid for the labour of himself and his clerks as an attorney, in preparing briefs and opinions, and then receive a fee for action as advocate in Court. The expense would not be diminished, but the efficiency of the profession would be curtailed. The standard of the profession would be lowered, and if there was any saving, it would be more than counterbalanced by the entanglements and evils in which suits would be involved from the inefficiency of the profession; and this was the opinion of the most talented and respectable witnesses that were examined, and of the judges of the land.

“ Mr. Dangar would second the motion; but he did not feel that it went far enough; it did not touch the great evils of the present law system. The Committee, of which the honourable member was chairman, should have laid down some plan by which the enormous amount of bills of costs could be checked. The honourable member spoke at some length in favour of allowing attorneys to appear as advocates in civil as well as criminal cases on circuits, and advocated the general question of the amalgamation of the profession.

“ The Attorney-general regretted that he could not altogether support the Bill which had been introduced, although a member of the Committee by whose direction it was framed; and he must take the opportunity of attesting the pains and assiduity with which the honourable member for Sydney, as Chairman, conducted the inquiry, particularly as to the possibility of diminishing costs; and on that point he would refer the honourable member for Northumberland to the last page of the Committee's Report, where he would find the following passage:—

“ ‘ Your Committee, in reference to this subject, have only further to observe, that it is not by degrading the legal profession in the way proposed that the expense of litigation can be reduced. This evil, if it exists to the extent complained of, would not be mitigated, but increased, by the introduction of measures tending thus to degeneracy in the Bar and the Bench; since it is upon their learning, their character, and their integrity, that society is, and must ever be, mainly dependent for the vindication and conservation of all that is most dear and valuable in social estimation. The sure way of attaining this great end—the cheap, as well as the due dispensation of law, is, after making provision ‘ to

producing, at all events in hastening, these changes. The iron highways have effectually changed the face of the Continent,

secure," in the words of that eminent jurist, Judge Storey, "the upright and enlightened administration of justice, by encouraging talented advocates to fit themselves for eminence at the Bar, and by supporting with liberal salaries the dignity, the virtue, and the independence of the Bench," *is to cut down the oppressive fees which are exacted by the Government from suitors,—to get rid of the senseless jargon and prolixity of some of the forms of law,—to do away with those subtleties and niceties which are the groundwork of so much technical and expensive argument in Court on matters not at all, or but slightly, connected with the real merits of cases,—to abolish all useless forms,—to cut off all sources of delay,—to establish a larger summary jurisdiction in the Supreme Court in cases sounding in debt,—to regulate bills of costs in all departments of the law, and subject them in every instance to due taxation,—to give the Judges a summary power of saddling the practitioners of the Court with the payment of all costs resulting to clients from negligence or ignorance,—and, above all, to thoroughly cleanse out that Augean sty, the Court of Equity, and, instead of the prolix, dilatory, and expensive system which prevails there at present, to introduce a concise, simple, and expeditious mode of proceeding, suited to the wants and means of the community at large.*

"This would show that the Committee did endeavour to go to the root of the evil; but they did not believe that breaking down the barrier between the two branches of the profession would attain that object. If honourable members had read the evidence, particularly that of Sir A. Stephen, who had had experience where the profession is in theory amalgamated, they would see that to do away with the division would not cheapen law, but would be injurious in other respects. It was also shown, that in the United States, although the profession is not separated in theory, it is in practice. It might be recollected that Mr. Brewster quoted from Buckingham's 'America' to show that the profession is not divided there; but he had only read a portion of the passage, or he would have found, that in practice the profession is as much divided there as in England. In the Supreme Court of the United States, the same persons who act as attorneys do not act as counsellors, but in the state of New York there is no division in theory; but what was the practice? (The honourable member here read two extracts from Buckingham's "America," showing, that when a young man is admitted as a lawyer, he does not at once commence acting as a counsellor or advocate, but confines himself to the duties of an attorney until he has acquired a standing in the profession, while some never practise as counsellors at all.) There are in New York seven hundred lawyers, none of whom have a less income than from 600*l.* to 700*l.* a year, and the smallest fee for a barrister is 100 dollars, or 20*l.*, and the largest in ordinary cases 500 dollars, or 100*l.*, but in a special case, where a counsel had to go far from home, 25,000 dollars, or 5000*l.* has been given. This showed the amount of fees given in America, and he might mention, that when Sir A. Stephen arrived here, he was surprised at the small amount of fees that were given. It is quite certain, that the fees that barristers get now are much smaller than were given before the division of the profession, when attorneys had to mark their own briefs: and it was quite a mistake to suppose that the amalgamation of the profession had caused any

and certainly the present constitutions which have been given to most of the great German and Italian states, cannot more

diminution of expense. He did not think the recommendation, on the Report of the Committee, that attorneys should be allowed to practise in the Courts of Quarter Sessions and at Assizes was borne out by the evidence. He had never seen any want of barristers at the Assizes, but he had known a barrister employed from morning to night defending a prisoner, whose case he had undertaken at the request of the Judge, without any fee, and employing as much zeal as if he had received 100*l.* with his brief. But if attorneys have the proposed privilege, no barristers will go to the Assizes, the attorney and barrister will not be on fair terms; the attorney can go into the gaol and secure his client, and as he will not be likely to underrate his own services, he will seldom think the prisoner has more money than will remunerate him, and he will step into the barrister's shoes and conduct the case; and he would ask any Gentleman, who was conversant with the subject, whether he thought country attorneys could conduct their clients' cases as effectually as barristers could? At the Quarter Sessions, at present, if there are not two barristers present, attorneys can act as advocates, and, so far as the public is concerned, he did not think more was required. It was asked, if attorneys were admitted to act as advocates in criminal cases, why should they not do so in civil, and he could not see why the difference should be made; but if they were allowed in either, barristers would not go at all, and in the event of any heavy civil case in which barristers were required, they would have to be sent for and specially retained at a heavy expense. He was authorised to say that there had been a meeting of the Bar on this Bill, and they were unanimous in opposing the first, second, and seventh clauses: they entirely agreed with the principle that the Colonial youth should have the means of being called to the Bar, without going to England, but it had been suggested, that, instead of the mode proposed, their admission should be entrusted to something like an inn of court, to be composed of the judges, and some of the older members of the profession. Although he agreed to the principle, he would say, that any person who had the opportunity of sending his son home to be called, would be treating him with injustice if he did not do so; for, in the first place, as a British barrister he would be entitled to appear in any court in the British dominions, while he would have the advantage of those collegiate and scholastic establishments, we shall not have in this colony for a long period. He wished it to be understood, however, that the Bar were most anxious to assist in this matter in any way that they could. As for the clause allowing a barrister to be disbarred and become an attorney, it was repudiated by the profession as an insult, there was no one would accept it. He would be sorry to vote against the second reading of the Bill, for there was a principle in it he approved of; but in its present state he must do so, and he would put it to the honourable member whether it would not be better to withdraw the Bill until a clause respecting the admission of Colonial youth could be matured and brought in, which would only occupy a few days.

"Mr. Lowe (of the Colonial Bar) considered that it was impossible to legislate on this question, without having some principle on which to act, and on that principle the House had avoided giving any opinion. He was favourable to



completely differ from the modes of government which they have displaced, than does the elegant carriage whirled along

the amalgamation of the profession: he considered it was based on right principles, and that it would be a step towards simplifying the practice of the law and save a considerable expense to the litigating public.

"But was the House of that opinion? If they were not, if they would have the luxury of a separate Bar they must pay for it: the Bar must be maintained in affluence if it is to be respected and respectable.

"They must not nibble at the privileges of the Bar by admitting attorneys here, and nibbling at a guinea here; but if they would have the honour and glory of having a Bar, they must forego the abstract right of having their cases conducted by any lawyer they approved of, and maintain the Bar properly.

"If they adopted a contrary course, and determined to have a Bar, and not maintain it in respectability, they would find themselves without a Bar, and without any one prepared to take their places. If the profession were amalgamated, the good men would soon come to the top, and take the leading business; but at present the Bar is being starved out, and he stated as a fact, within his own knowledge, that within the last year or two the barristers in this Colony have not been remunerated for their labour. Look at the Bar within the last year or two. For himself he could say he had as much practice as his health would admit him to attend to,—but what was the general state of the Bar? Mr. Windeyer had died; Mr. A. Beckett made a Judge; Mr. Manning made a Judge; Mr. Gordon gone to India; Mr. Michie, one of our ablest practitioners, about to sail for England, and another of considerable ability about to leave; although, as he had not quite made up his mind, he would not mention his name.

"How were their places to be filled up? was it likely that, if the remuneration was not sufficient to keep them here, that it would be sufficient to induce others to come out, and what will be the result? Why that very soon the law will be a complete monopoly. As to opening the Bar to youth born or educated in the Colony, it ought to be open to all if they can go through the required examination. The Bar he did not consider was a good tribunal to have the examination of candidates; the Judges, with the Attorney-general, and one barrister, would, he thought, be the best parties to prepare rules, and decide what the examination in Latin, Greek, and Mathematics, should be, but did not think they should examine, but leave that to parties whom they might appoint. The standard should be high, considering the means of education in the Colony, but at the same time it must not be forgotten, that *a man need not be able to read or write, except to write his name, to be called to the Bar in England*, but let a person come from where he may, if he can pass the examination he should be admitted.

"Mr. Wentworth, in bringing in the Bill, had merely acted as an organ of the Committee, and the only clause in it which had his hearty assent was that which would enable young men to be called to the Bar here. The other portions of the Bill he was opposed to. If the Bill were now read he would postpone the Committee until a future day, to give time for framing a clause respecting the examination of persons applying to be admitted to the Bar here.

by the locomotive, from the old lumbering *Alwagen* or tedious *vettura* of ten years ago. These enormous undertakings accustomed the public mind to a feeling of movement; a desire to go *a-head*, mixed up with a vague idea of unknown and irrepressible power.<sup>1</sup> The princes and kings of the land put themselves at the head of the one undertaking as they have since done of the other, and thus we first heard of Prince William's line and Emperor Ferdinand's line, to which have now succeeded codes and constitutions from the same royal and imperial hands. As we are friends alike to railroads and free government, we rejoice in all this; provided that the rate of travelling in reaching the end of the journey is not too rapid to be safe.

In this country, in which the success of this mode of travelling was first established, we have proceeded in the first place with our constitutional caution, and in the next place with our constitutional love of speculation and greediness of gain. We were first content to receive the discovery rather as a wonderful than as a practical undertaking. By degrees, however, the scheme developed itself, and then, from something approaching to dislike, the feeling changed to an almost frantic adoption; and now the railroad system has absorbed a larger amount of property than any other class of private undertakings.<sup>1</sup> It has become a large and settled

"The question was then put on the second reading, and the numbers were,

Ayes	-	-	11
Noes	-	-	5
<hr/>			
Majority			6

"The Bill was then read a second time."

<sup>1</sup> It was said of the late Pope Gregory IX., "*Il papa non ama le strade ferrate.*" In the remarkable pamphlet of the Marchese Massimo Azeglio, written under the present papacy, it is said, speaking of the reign of his late Holiness, "Why so obstinately oppose the construction of railroads? Always for the same reason — the fear that they may convey more ideas than merchandise." As translated in *Italy in the Nineteenth Century*, vol. ii. p. 336, by James Whiteside, Q. C., an interesting and agreeable work, which gives a good account of Italian Law Reform, to which we very shortly propose to return.

<sup>2</sup> "The capital expended on railways now open for traffic, stated in the traf-

branch of our industry, employing hundreds of thousands of persons, and winding its way and carrying with it its influence into every corner of the land.

Among the persons who have assisted in, and benefited by, the railroad adventure, certainly our own profession has had perhaps the lion's part, although it must be admitted that the surveyors have run us pretty hard. We have shared in its more prosperous days, but as we are not fair weather friends, we shall also stand by it in its adversity. In the golden period when new lines were every day projected, and new bills every day brought in, we revelled in committees and enjoyed ourselves in drawing clauses, and now in these iron times we must content ourselves with bringing actions for calls and hunting up liabilities.

There are happily few phases of life which do not bring some consolation to the industrious and painstaking lawyer. Among others, one class of the profession who have ever been the particular objects of our regard, the conveyancers, have not been without their share in the general satisfaction: and their province, although perhaps curtailed, yet remains. Few new railway bills, we apprehend, will be brought in in the next session; but much land has been scheduled by former acts, a good deal has been contracted for, and probably over still more the railway contractor shakes the dart "but delays to *strike*;" so that there is in this branch of practice fortunately, much yet to be done; many titles to examine, many deeds, short but sweet, to draw; and indeed, it must be confessed, that in this way, if in no other, the railroad has been a very charming invention.

Besides this, the railroads have now got into their possession a very considerable portion of the entire surface of the

fic table of this journal, amounts to 148,400,000*l.*; deducting 17,200,000*l.*, the amount stated by the railway companies in their last half-yearly reports to be unproductive, leaves a productive capital of 131,200,000*l.* The revenue from traffic on the railways representing this capital during the last half year amounts to 4,722,719*l.*, and the working expenses to 2,341,770*l.*; leaving a profit of 2,380,949*l.* for the half year on that capital." (*Herapath's Railway Journal*, cited in *Times* of Oct. 7. 1848.)

country, and questions of considerable interest have already occurred, and will doubtless continue to arise out of their possession and dealing with it; and to be serious, we believe that any cloud which may now overshadow the railroad system will soon pass over, and that it must regain the confidence of the public. Its effects, in many respects, both direct and indirect, have been most remarkable; and, without attempting to consider them in all points of view, it is our present purpose to see in what manner the institution of railroads has affected our system of conveyancing; and we think it will be found that in no one point has it had greater influence than in this, nor can it be said that that influence is exhausted. We shall find that very considerable changes have been thus introduced, and that these changes are to be regarded as not confined to the dealings in land to which they more immediately relate, but as likely to influence the general practice of conveyancing. The Outstanding Terms Act<sup>1</sup> may be directly traced to one of the usual clauses inserted in the railway acts, and now stereotyped in the Lands Clauses Consolidation Act, 1845<sup>2</sup>; the rules as to payment of money into court have been adopted in the Irish Incumbered Estates Act<sup>3</sup>; the short forms employed have had an extensive collateral operation, and the country gentlemen are beginning to ask why they may not be extended to all other conveyances, and to receive very equivocal answers.<sup>4</sup> The absurd distinction between marketable and holding titles<sup>5</sup> is falling to pieces under the influence of the railway practice as to titles; and, in short, if we may venture upon a pun, these institutions have encouraged, fostered, and to a certain extent created, a demand for cheap and easy *conveyances*, in more senses of the word than that usually connected with them. Under these circumstances, we think it may be attended with some advantage if we endeavour to trace what appear

<sup>1</sup> 8 & 9 Vict. c. 112.

<sup>2</sup> Sect. 81.

<sup>3</sup> 11 & 12 Vict. c. 48.

<sup>4</sup> See evidence before Committee of House of Commons (1848), on Office of Woods and Forests, and *post*.

<sup>5</sup> We are beginning to hear, in common professional talk, of a *railway title*.

to us to be the great objects intended by the legislature in its dealings with this kind of property; and we shall take as our best guide for this purpose the Lands Clauses Consolidation Act, 1845<sup>1</sup>, which has not only incorporated and improved most of the clauses inserted in previous acts, but is at once the basis on which the greater part of the existing railroad system is laid, and the pivot on which it turns. This we shall proceed to show.

In the first place it is to be observed that the powers given to the company by any special act passed after 8th of May, 1845, to construct the railway and to take the lands for that purpose, are not only subject to the provisions contained in the Railways Clauses Consolidation Act, 1845, but also to the Lands Clauses Consolidation Act, 1845.<sup>2</sup>

It should further be noticed that the powers given to the companies, setting aside, as they do in many cases, the rules of Common Law, will be construed strictly. They are to be taken as the contract which the legislature makes with the company<sup>3</sup>; and it will be kept within the bounds of that contract. The act gives the company, says Mr. Baron Alderson<sup>4</sup>, "power to take a man's land *without any conveyance at all*; for if they cannot find out who can make a conveyance to them, or if he refuse to convey, or if he fail to make out a title, they may pay their money into Chancery, and the land is at once vested in them by a parliamentary title." This is not quite correct; because in such cases the company must execute a deed poll, which operates as a conveyance.<sup>5</sup> But there can be no doubt that a company undertakes that they shall do and submit to whatever the legislature empowers and compels them to do, and they shall do nothing else; that they shall do and shall forbear all that they are

<sup>1</sup> 8 Vict. c. 13.

<sup>2</sup> 8 Vict. c. 20. s. 6.

<sup>3</sup> Per Lord Eldon, C., *Blakemore v. Glamorganshire Canal Company*, 1 Myl. & K. 162.; *Parker v. Great Western Railway Company*, 7 Man. & G. 105.; 7 Scott, N. R. 835.

<sup>4</sup> *Doe d. Hutchinson v. Manchester, Bury, and Rossendale Railway*, 14 M. & W. 694.

<sup>5</sup> 8 Vict. c. 18. ss. 77. and 113.

thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.<sup>1</sup> They are entitled to the powers given them by the acts, but they are not entitled to any enlarged powers by way of construction of the act under which they are established.<sup>2</sup>

The cases have even gone further ; and it has been repeatedly held, that any ambiguity in the terms of a contract must operate against the adventurers, and in favour of the public.<sup>3</sup>

The powers conferred on the company in the statute of incorporation are not only to be modified by the provisions contained in the two acts above referred to, but will also be influenced by those agreements which the company has made with third parties before obtaining the act. Such agreements will operate as restrictions on the rights and powers conferred by the legislature, and the Courts will enforce them whenever the contract has been duly entered into, and for a proper consideration.<sup>4</sup> But we apprehend that these agreements must not be inconsistent with the provisions of the public acts before referred to as regulating railways.

By the Lands Clauses Consolidation Act (8 Vict. c. 18.), it shall be sufficient, for the purpose of incorporating a portion of its provisions in any other act, to enact that the clauses of the Lands Clauses Act (describing such matters as are described in this act in the words introductory to the enactment with respect to such matters) shall be incorporated with such act ; and therefore all the clauses with respect to the matters so incorporated shall, save so far as they shall be expressly varied by such act, form part of such act.

<sup>1</sup> Per Lord Eldon, C., *ubi supra* ; and per Lord Tenterden, C. J., *Stourbridge Canal Company v. Wheeler*, 2 B. & Ad. 793. "If the Court do not require companies, in taking land, to keep strictly within the powers given them by the Legislature, their acts may be converted into the means of the grossest tyranny." Per V. C. Shadwell, 4 Rail. C. 819.

<sup>2</sup> Per Lord Cottenham, *Webb v. Manchester and Leeds Railway Company*, 1 Rail. C., 599. 4 M. & C. 120.

<sup>3</sup> Per Lord Tenterden, C. J., *Stourbridge Canal Company v. Wheeler*, *ubi sup.* ; *Priestley v. Foalda*, 2 Man. & G. 175. ; 2 Rail. C. 441. ; *Chambers and Peterson on Rail.* 175.

<sup>4</sup> *Chambers and Peterson on Rail.* 176., and cases there cited.

The compulsory powers given by the particular act are usually given for a limited period; but if not, the general act limits them to three years.<sup>1</sup>

We shall now proceed to mention the chief points provided for by that act. A distinction should be borne in mind with respect to persons who are entitled to deal with their lands as they please, and persons under disability. Persons labouring under no disability may, of course, convey to whom they please; but as to them the act enables certain steps to be taken in case of the neglect to produce a title, or the making a bad title, or executing conveyances. It gives, with respect to the lands included in the undertaking, a compulsory power of obtaining such lands. But with respect to persons under disability, it also gives powers enabling them to convey. The machinery for carrying into effect these different objects is sometimes the same.

With respect to both classes, the act gives a title against all the world, on paying the proper value or compensation; and it provides a machinery for ascertaining and determining such value or compensation.

*I. First, then, as to the powers given to the company to contract for lands by agreement, as well with persons under disability as those who are not so incapacitated.* Powers of the greatest importance are given with respect to the purchase of lands by agreement.

The promoters of the undertaking may agree with the owners of the lands, and with all parties having any estate or interest in such lands, by this or the special act enabled to sell and convey the same, for the absolute purchase, for a money consideration, of any such lands or such parts thereof as they shall think proper, and of all estates and interests in such lands of what kind soever.<sup>2</sup>

All parties entitled to lands, or any estate therein, may sell and convey or release the same to the promoters of the undertaking; and particularly the following persons (who, it need not be said, cannot do so effectually without the sanc-

<sup>1</sup> 8 Vict. c. 18. s. 123.

<sup>2</sup> Sect. 6.

tion of parliament): all corporations<sup>1</sup>, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees or feoffees in trust for charitable or other purposes, executors, and administrators; all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, or subject to any estate in dower, or to any lease for life or lives, and year or for years, or any less interest, not only on behalf of themselves and their respective heirs, executors, and administrators, and successors, *but also on behalf of any person entitled in reversion, remainder, or expectancy after them, or in defeasance of the estates of such parties*; and as to such married women, whether they be of full age or not, as if they were sole and of full age; and as to such guardians on behalf of their wards, and as to such committees on behalf of the lunatics and idiots of whom they are the committees respectively, and that to the same extent as such wives, wards, lunatics and idiots respectively could have exercised the same power under the authority of this or the special act, if they had respectively been under no disability; and as to such trustees, executors, and administrators, on behalf of their *cestui que trusts*; as to infants, issue unborn, lunatics, *femes covert*, or other persons, and that to the same extent as such *cestui que trusts* respectively could have exercised the same powers under the authority of this and the special act, if they had respectively been under no disability.

This is one great principle pervading the act. It is followed up by giving the same parties empowered to convey, power to enfranchise copyhold lands.<sup>2</sup>

But of course, if persons under disability are authorised to convey, proper protection must be given to the consideration money. In all such cases the purchase-money and all compensation to be paid for any permanent injury to any such lands, shall not be less than shall be determined by two able

<sup>1</sup> There is one exception: municipal corporations cannot sell without the approbation of the Treasury. Sect. 15.

<sup>2</sup> Sect. 8.



practical surveyors, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor<sup>1</sup> appointed by two justices. The money, when so determined, is to be deposited in the Bank of England, for the benefit of the parties interested.<sup>2</sup>

Persons seised in fee of lands or entitled to dispose of them absolutely, may sell them in consideration of an annual rent-charge, but not others.<sup>3</sup>

The same powers are given to persons under disability when the special act empowers the promoters of the undertaking to purchase lands for extraordinary purposes.<sup>4</sup>

The promoters of the undertaking, having so acquired land, may resell it, and purchase other land, and resell it from time to time, so that the land taken shall not exceed the prescribed quantity<sup>5</sup>; for it is to be observed that such promoters are not, by virtue of the power, to purchase lands from persons under disability to buy more than the prescribed quantity of land.<sup>6</sup>

## II. *Compulsory Powers for the Purchase of Land.*

So far as to the purchase of land by agreement. Let us now consider the compulsory powers given by the act.

When the promoters of the undertaking shall require to take any lands, they shall give notice to all parties interested therein, or to the parties enabled by the act to sell and convey them, and by such notice shall demand from such parties the particulars of their estate and interest in the lands, and of the claims made in respect thereof; and every notice shall state the particulars of such lands, and that the promoters of the undertaking are willing to treat for the purchase thereof.<sup>7</sup> It may be observed, that if the land is purchased by agreement the provisions as to notice cease to be of much consequence, but when the purchase is compulsory, they must be carefully

<sup>1</sup> Sect. 9.

<sup>2</sup> Ibid.

<sup>3</sup> Sects. 10. and 11.

<sup>4</sup> Sect. 12.

<sup>5</sup> Sect. 13.

<sup>6</sup> Ibid.

<sup>7</sup> Sect. 18.

attended to. It is usual to send with the notice a plan of the property in question, with the line of railway and the land required, distinguished in different colours. This notice is, in fact, frequently the only written contract between the parties. It is frequently of great importance, and has been the subject of many interesting questions. The company are not bound to purchase property mentioned in the schedule, but the question is at what period they shall be said to have exercised their option. This has been held to be done when they have given notice, and then such notice is as binding on them as on the owner of the land<sup>1</sup>, and establish the relation of vendor and purchaser between the company and the owners or occupiers of the lands therein mentioned.<sup>2</sup>

All persons having any estate or interest in the lands are entitled to have notice, whether they claim in their own right or in a representative capacity.<sup>3</sup> Even a person who has merely an easement over the land required is to be served with notice, although his right to compensation does not accrue till an injury is actually inflicted.<sup>4</sup> But it seems that notice need only be served on those parties whose lands have been included in the schedule and books of reference, and for such lands as are required for the purpose of the undertaking, and not upon those whose property is not included therein, although such property is likely to be physically injured by the execution of the works. In this latter case it seems to be the duty of the owner of the land, or the party suffering the injury, to take the initiative by serving a notice on the company requiring compensation.<sup>5</sup>

All notices are to be served personally on the parties interested, or to be left at their last usual place of abode, if it can be found, and if they are absent from the United King-

<sup>1</sup> *Rex v. Hungerford Market Company*, 4 B. & Ad. 327.

<sup>2</sup> *Stone v. Commercial R. Company*, 1 R. C. 375. ; 4 M. & K. 122.

<sup>3</sup> *Ex parte Farlow*, 2 B. & Ad. 341. ; *Thicknesse v. the Lancaster Canal Company*, 4 M. & W. 472. ; *Lee v. Milner*, 2 M. & W. 824.

<sup>4</sup> See references, note (\*).

<sup>5</sup> *Walker v. the London and Blackwall Railway Company*, 3 Q. B. 744. ; *Chamb. & Pet. on Rail*. 181.

dom, or cannot be found, after diligent inquiry, it shall be left with the occupier, or if no occupier, shall be affixed on some conspicuous part of such lands.<sup>1</sup>

The notice to treat for the purchase of any interest in lands must contain such a description of the property proposed to be taken as shall be sufficient for the information of the party served therewith, so as to enable him to make a proper demand.<sup>2</sup> It must also include an offer on the part of the promoters to negotiate for the purchase thereof, and to make compensation for any injury done; and when there is no such offer in the notice, the proceedings may be treated as a nullity.<sup>3</sup>

It for some time remained doubtful whether, after service of the notice, the company was precluded from demanding more land than that specified in the notice.<sup>4</sup> But a late case may be considered to have helped to a settlement of this question.

In this case there were three notices given. The first was treated by both parties as invalid. In the second the company stated that they should require twenty perches of land, but before anything was done on either side, they gave notice of withdrawal of this second notice, and served a third notice on the plaintiff, whereby they stated that they required one perch only of the plaintiff's land. "The first notice," said Sir L. Shadwell, V. C., "was given, but, as I understand, it was disregarded by both parties, and is admitted to be invalid. The second notice was given on the 16th of December, but had not been acted upon, and nothing was done by either party under it before the third notice, of the 24th of December, was given. In the third notice of the 24th of December, there is a substantial variation from the second notice, and the company take upon themselves to recall the former notice and to substitute the third in its place. I am

<sup>1</sup> S. 19., and as to service of notice on a corporation aggregate, see s. 20.

<sup>2</sup> *Sims v. Com. R. Co.*, 1 R. C. 431.

<sup>3</sup> 8 Vict. c. 18. s. 18.; *Chamb. & Pet. on Rail.* 182.

<sup>4</sup> *Stone and others v. Commercial R. Co.*, 1 R. C. 402.

of opinion that the company have no power to do this, except with the concurrence of the other party. If the notice, when given, were allowed to be recalled and varied at the pleasure of companies, they might continually plague and perplex proprietors with new notices, so that it would be impossible for them to know how to deal with the remainder of their land. I do not think that, under the true construction of these acts, the company have the power to do this, and my opinion is that the first valid notice is the one which is binding on the parties." His Honour, therefore, granted an injunction to restrain the company from proceeding on the last notice.<sup>1</sup> In a subsequent case, his Honour, with reference to this and other cases, stated that the principle on which he decided them was, "that a notice having been given requiring a particular piece of land, a subsequent notice describing the same land *and* some other, *or* some other, will not do, because railway companies are required at once to state what land they want."<sup>2</sup> But having this principle in his mind, his Honour refused to apply it to the following case:—A railway company were empowered by their first act to take compulsorily certain lands for the purpose of their act, but were limited to twenty-two yards in width, except for purposes therein specified. The company agreed with the plaintiffs for a *certain portion* of the lands, and the price was fixed by arbitration. They subsequently obtained two acts of parliament, by one of which they were empowered to erect a station, and the powers of taking land given by the first act was extended to these acts, which, however, did not contain any new schedule. The company, who had already taken twenty-two yards for their railway, served notices on the plaintiff, slightly differing from each other, but sufficiently clear to identify the lands, and thereby required the rest of the plaintiff's land comprised in the schedule to the first act, "under the authority of that and their two subsequent acts, or one of them;" but such notices did not state the purposes for which the land was required, and it was held that the company had not, by taking

<sup>1</sup> *Tanner v. the Lynn and Ely Railway Company*, 4 R. C. 615.

<sup>2</sup> *Simpson v. the Lancaster and Carlisle Railway Company*, 4 R. C. 633.

the land for their railway, *exhausted* the powers of the fresh act so as to preclude them from taking more land for their station, and it being shown by affidavit that the land was required for a station, the plaintiff's application for an injunction was refused, with costs.<sup>1</sup>

If for twenty-one days after service of notice any party shall fail to state his claim, or to treat in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of compensation, it shall be settled as follows<sup>2</sup>:—

If no agreement be come to between the promoters of the undertaking and the owners, and if such compensation shall not exceed 50*l.*, the same shall be settled by two justices.<sup>3</sup> If it shall exceed 50*l.*, it is to be settled either by arbitration or jury, at the option of the party claiming compensation.<sup>4</sup> For the purpose of settling compensation, any justice, on the application of either party, may summon the other party to appear before two justices at a time and place to be named in the summons, and on the appearance of such parties, or in their absence on proof of service of the summons, such justices may hear and determine such question.<sup>5</sup>

When the compensation is to be determined by arbitration, the mode of proceeding is regulated by ss. 25—37. The rules here laid down do not differ from the *usual* course in similar cases. The compensation may also be settled by a jury, which is to be summoned and proceeded with in the way provided for by ss. 38—50.

When the inquiry relates to the value of land to be purchased, and also to compensation claims for injury done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the work, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained, he is enabled to sell and convey, and for

<sup>1</sup> *Simpson v. the Lancaster and Carlisle Railway Company*, 4 R. C. 625.

<sup>2</sup> Sect. 21.

<sup>3</sup> Sect. 22.

<sup>4</sup> Sect. 23.

<sup>5</sup> Sect. 24.

the money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severance of the lands taken from the other lands of such owner.<sup>1</sup>

The mode in which the costs of the inquiry before a jury is to be borne is regulated by ss. 51—53.

We have been hitherto speaking of a common jury, but a special jury is to be summoned at the request of either party. ss. 54—56.

When the party whose land is to be purchased is absent, the compensation for any permanent injury to such land shall be such as shall be determined by the valuation of such able practical surveyor as two justices shall nominate.<sup>2</sup>

Where such compensation shall have been so determined, if the owner or party interested shall be dissatisfied with such valuation, he may require that the question whether such compensation is sufficient shall be submitted to arbitration.<sup>3</sup>

In estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased, but also to the damage to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner or owners injuriously affecting such land.<sup>4</sup>

### III. *Application of Purchase Money.*

We next come to consider how the purchase money or compensation is to be applied where the parties to whom it is coming have limited interests, and the same sections apply where they are prevented from treating, or cannot make a title.

Where this shall amount to or exceed 200*l.* it shall be paid

<sup>1</sup> Sect. 49.

<sup>2</sup> Sect. 58. As to this proceeding, see ss. 59—62.

<sup>3</sup> Sects. 64, 65. See also ss. 66, 67.

<sup>4</sup> Sect. 63.

into the Bank in the name of the accountant-general, to be applied in the purchase of land-tax, or the discharge of any debt or incumbrance affecting the land, in the purchase of other lands to be settled to the same uses in respect of which such money shall have been paid, or, if it shall have been paid, in respect of buildings, in removing or replacing such buildings, or substituting others, as the Court of Chancery shall direct.<sup>1</sup>

If such purchase money or compensation shall not amount to 200*l.* and shall exceed 20*l.*, the same shall be deposited in the Bank or paid to trustees<sup>2</sup>, and sums not exceeding 20*l.* are to be paid to the parties entitled to the rents and profits, or in case of coverture, infancy, idiotcy, lunacy, or other incapacity, then such money shall be paid for their use to the respective husbands, guardians, committees, or trustees of such persons.<sup>3</sup>

#### IV. *Conveyance of the Lands.*

On deposit of the money in the Bank, the owners of the lands, including in such terms all parties enabled by the act to sell or convey them, shall convey the same to the promoters of the undertaking, or as they shall direct; and if they fail to make a good title thereto to their satisfaction, the promoters of the undertaking may, if they shall think fit, execute a deed poll under their common seal, if they be a corporation, or if not under their hands and seals, containing a description of the lands in respect of which such default shall be made, and reciting the purchase or taking thereof by the promoters of the undertaking, and the names of the parties from whom the same were purchased or taken, and the deposit made in respect thereof, and declaring the fact of such default having been made; and thereupon all the estate and interest in such lands capable of being sold and conveyed by the party between whom and the promoters of the undertaking such agreement shall have been come to, shall vest absolutely in the promoters of the undertaking.<sup>4</sup>

<sup>1</sup> Sect. 69.

<sup>2</sup> Sect. 71.

<sup>3</sup> Sect. 72.

<sup>4</sup> Sect. 75.

Where the owner of any such land, on tender of the purchase money or compensation, shall refuse to accept the same, or neglect or fail to make out a title thereto, or to convey or release such lands, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear or inquire before a jury, the promoters of the undertaking may deposit the purchase money or compensation in the Bank, to the credit of the parties interested in such lands subject to the controul of the Court.<sup>1</sup>

On any such deposit being made, the cashier of the Bank shall give a receipt for the same, and the promoters of the undertaking may execute a deed poll under their common seal, if they are a corporation, or if they be not a corporation under their hands and seals, containing a description of the lands in respect of which the deposit has been made, and declaring the circumstances under which, and the names of the parties to whose credit such deposit shall have been made, and such deed poll shall be stamped with the stamp duty, which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein, and thereupon all the estate and interest in such lands of the parties for whose use, and in respect whereof, such purchase money or compensation shall have been deposited, shall vest absolutely in the promoters of the undertaking, *and as against such parties* they shall be entitled to immediate possession of such lands.<sup>2</sup>

On application by petition of any party making claim to the money so deposited, or to the lands in respect of which the same is so deposited, the court may order the money to be invested in the funds, and may order the distribution of the money or the payment of the dividends, according to the respective estates, titles, or interests of the parties making claim to such money or lands.<sup>3</sup>

If any question arise respecting the title to the lands in respect whereof such money shall have been so paid, the parties respectively in possession of such lands as being the owners or in receipt of the rents of such lands shall be

<sup>1</sup> Sect. 76.

<sup>2</sup> Sect. 76.

<sup>3</sup> Sect. 78.



deemed to have been lawfully entitled to such lands until the contrary be shown, and shall be deemed entitled to the money so deposited, and to the dividends thereof.<sup>1</sup>

Wherever money is so deposited, except on the wilful refusal of a party to receive the same, or to convey or release the lands, or by reason of wilful neglect to make a title, the court may order the costs of the following matters to be paid by the promoters of the undertaking; the costs of the purchase or taking of the lands, the costs of the investment of the monies in government or real securities, and of the reinvestment thereof in the purchase of other lands: but the cost of one application only, for reinvestment in land, shall be allowed, unless it shall appear that it is for the benefit of the parties interested in the monies, that the same should be invested at different times and in different sums.<sup>2</sup>

#### *V. As to the Form and Expense of the Conveyance.*

Conveyances of lands purchased under the provisions of the act or the special act, may be according to the form given in the schedule, or as near thereto as the circumstances of the case will admit; or by deed in any other form which the promoters of the undertaking may see fit; and all conveyances made according to such forms in the schedule, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall operate to merge all terms of years attendant by express declaration or by construction of law on the estate or interest so thereby conveyed; and to bar or destroy all such estates tail, and all other estates, titles, remainder, reversions, limitations, trusts, and interests whatsoever, of and in the lands comprised in such conveyances, which shall have been purchased or compensated for by the consideration therein mentioned; but though the terms shall be thereby merged, they shall in equity afford the same protection as if they had been kept on foot and assigned to a trustee to attend the entrance.<sup>3</sup>

<sup>1</sup> Sect. 79.

<sup>2</sup> Sect. 80.

<sup>3</sup> Sect. 82. Compare this with the terms of the Act 8 & 9 Vict. c. 112.,

The first question which arises on this section, and it is one of great practical importance, is how far resort should be had, as the parties are not compelled to use it, to the form given in the schedule to the act. It is said in a work by two learned gentlemen, Messrs. Frend and Ware, *Precedents in Railway Conveyancing*, p. 133., that it is not generally expedient to adopt this form.

We have, however, come to a different conclusion, and this is in conformity, we apprehend, with the general practice of the profession in this respect. We think, that wherever it is at all possible to employ this form it should be used. It has a peculiar operation given it by the act, and is certainly a more effectual assurance for the purposes of the promoters, than any other assurance now in force; and as the company prepares the deed, there are few cases, we conceive, in which a vendor can decline to adopt it, if it is tendered to him for execution.

In every conveyance *by* the promoters of the undertaking under this or the special act, the word "grant" shall operate as an express covenant for title, particularly set out in section 132.

The costs of all such conveyances shall be borne by the promoters of the undertaking; and such costs shall include all charges and expenses incurred on the part as well of the seller as of the purchaser of all conveyances and assurances of such lands, and of any outstanding terms or interests therein; and of deducing, evidencing, and verifying the title to such lands, terms, or interests; and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title.<sup>1</sup> If any dispute takes place as to costs, they shall be taxed by a taxing master.<sup>2</sup>

These are obviously great powers to be given to the pro-

which it is presumed would be subject to this, so far as railway conveyances are concerned.

<sup>1</sup> Sect. 82.

<sup>2</sup> Sect. 83.

moters of the undertaking, be it what it may. They may thus get possession of any land in this country, under any circumstances; but their entry upon it is placed under proper regulations, as we shall see hereafter.

Although the terms of the act, as to costs, are large, yet when a contract has been entered into by private agreement, and the owner of the lands, subsequently to such agreement, do or omit to do an act whereby the legal estate in the lands is altered previous to the conveyance to the company, the effect occasioned by this will fall on the estate, and may be deducted from the purchase money. The expense of the conveyance must be borne by the company, but if a suit is thus rendered necessary, the costs must be paid out of the purchase money<sup>1</sup>; but where there are infants, the court will sometimes look at the conveyance without a reference to the master.<sup>2</sup> In some cases of this nature, it will not be safe for the company to pay over the purchase money without the direction of a court of equity.<sup>3</sup>

#### VI. *Entry upon the Lands.* See also XV.

Payment of the price must be made in the mode provided for by the act, previous to entry on any lands, except for the purpose merely of surveying or taking levels, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works; for which purposes the promoters of the undertaking may enter, after having given notice, and making compensation for any damage done.<sup>4</sup> They may also be allowed to enter on the land before purchase, on making deposit by way of security, and giving bond<sup>5</sup>; and may then enter upon and use such land.<sup>6</sup> But if they shall wilfully enter upon such lands without consent before the payment of the purchase money, they shall forfeit to the party in possession a penalty of 10*l.*, and 25*l.* a day for every

<sup>1</sup> *Midland Counties Railway Company v. Wescomb*, 2 Rail. C. 211.

<sup>2</sup> *Eastern Counties Railway v. Tuffnell*, 3 Rail. C. 133.

<sup>3</sup> See *Midland Counties Railway Company v. Oswin*, 3 Rail. C. 497.

<sup>4</sup> Sect. 84.

<sup>5</sup> Sects. 85, 86, 87, 88.

<sup>6</sup> Sect. 85.

day they remain in possession.<sup>1</sup> Nor does this section forestal, as we apprehend, the remedy by injunction.

Where the promoters of this undertaking are authorised to enter upon and take possession of the lands, and the owner refuses to give possession, the promoters may issue their warrant to the sheriff to deliver possession of any such lands, and the sheriff shall deliver them accordingly.<sup>2</sup> It is to be observed, that no party shall be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell the whole.<sup>3</sup>

So where lands not situate in a town or built upon, shall be so cut through and divided by the works, as to leave either on both sides or on one side thereof a less quantity of land than half a statute acre, and if the owner of such parcel of land require the company to purchase the same along with the other land, the company shall purchase the same, unless the owner of the land have other land adjoining, in which the same can be conveniently thrown.<sup>4</sup> When the expense of bridges or other communication exceed the value of the land, the company may insist on purchasing the whole of the land.<sup>5</sup>

## VII. *Copyholds.*

The statute makes as great an inroad upon the law of copyhold land as it does upon other branches of the law. It is to be conveyed by the same species of assurance as if it were freehold, but the deed is to be enrolled on the rolls of the manor; and until the lands are enfranchised, they shall continue subject to the same fines, rents, heriots, and services, as were theretofore payable.<sup>6</sup> Three months after the enrolment, or within one month after the promoters of the undertaking shall enter on the lands for the purpose of the works, they shall procure the same to be enfranchised, and for that pur-

<sup>1</sup> Sect. 89.

<sup>2</sup> Sect. 91.

<sup>3</sup> Sect. 92.

<sup>4</sup> Sect. 93.

<sup>5</sup> Sect. 94.

<sup>6</sup> Sect. 95.

pose shall apply to the lord, and pay him such compensation as shall be agreed upon; and if the parties fail to agree, the amount of such compensation shall be determined as in other cases of disputed compensation.<sup>1</sup> Upon payment or tender of such compensation, or on deposit in the Bank, according to the circumstances of the case, or if the lord fail to adduce a good title, the promoters of the undertaking may execute a deed-poll, and thereupon the land shall become freehold.<sup>2</sup> If any copyhold land be subject to any customary rent, and part only of the land subject to the rent be required to be taken for the purposes of the act, the apportionment of such may be settled by agreement between the owner of the lands and the lord of the manor on the one part, and the promoters of the undertaking on the other part; and if such apportionment be not so settled by agreement, then the same shall be settled by two justices.<sup>3</sup>

#### VIII. *As to Commonable Rights.*

Compensation in respect of the right in the soil of lands subject to any right of common shall be paid to the lord of the manor in case he shall be entitled to the same, or to such party other than the commoners, as shall be entitled to such right in the soil; and compensation in respect of all other commonable and other rights in or over such lands, including therein any commonable or other rights to which the lord of the manor may be entitled other than his right in the soil of such lands, shall be determined and applied in manner hereinafter provided with respect to common lands, the right in the soil of which shall belong to the commoners; and upon payment or deposit in the Bank of the compensation, all such commonable and other rights shall cease, and be extinguished.<sup>4</sup>

On payment or tender to the lord of the manor, or such other party as aforesaid, of the compensation which shall have been agreed on or determined in respect of the right of soil

<sup>1</sup> Sect. 96.

<sup>2</sup> Sect. 97.

<sup>3</sup> Sect. 98.

<sup>4</sup> Sect. 99.

in the soil of any such lands, or on deposit thereof in the Bank, in any of the cases provided, such lord or such other party shall convey such lands to the promoters of the undertaking, and such conveyance shall have the effect of vesting such lands in the promoters of the undertaking in like manner as if such lord of the manor, or such other party as aforesaid, had been seised in fee simple of such lands at the time of executing such conveyance; and in default of such conveyance, the promoters of the undertaking may execute a deed-poll, as in the case of lands purchased by them, and thereupon the lands shall vest absolutely in the promoters of the undertaking, subject to the commonable and other rights affecting the same, until such rights shall have been extinguished by payment or deposit or compensation.<sup>1</sup>

When the common lands are not held of a manor, the compensation is to be ascertained in the manner provided for by s. 101.

With respect to the commonable or other rights over such lands, a meeting may be convened by the promoters of the undertaking for the purpose of settling the proper compensation.<sup>2</sup> And on payment thereof to the commoners, the lands are to vest in the promoters of the undertaking, freed and discharged from all commonable rights.<sup>3</sup>

### *IX. Lands in Mortgage.*

The next division of these Acts to which we shall call attention is of much practical importance. It is intended to provide for those cases in which the lands to be taken have been mortgaged.

The promoters of the undertaking may purchase or redeem the interest of the mortgagee of any such lands, and that whether they shall have previously purchased the equity of redemption of such lands or not, and whether the mortgagee should be entitled in his own right, or in trust for any other party; and whether he be in possession of such lands by

<sup>1</sup> Sect. 100.

<sup>2</sup> Sects. 102—106.

<sup>3</sup> Sect. 107.

virtue of such mortgage or not; and whether such mortgage affect such lands solely or jointly with any other lands not required for the purpose of the special act. In order thereto, the promoters of the undertaking may *either* pay or tender to such mortgagee the principal and interest due on such mortgage, together with his costs and charges, if any; and also six months' additional interest; and thereupon such mortgagee shall immediately convey his interest; *or* they may give notice to the mortgagee that they will pay off principal and interest due to such mortgagee at the end of six months.<sup>1</sup>

If, on such payment or tender, any mortgagee shall fail to convey or release his interest in such mortgage, or if he fail to adduce a good title thereto, then the promoters may deposit in the Bank the principal and interest, and costs, if any, and thereupon they may execute a deed-poll; and, then, as well as upon such conveyance by the mortgagee, "all the estate and interest of such mortgagee, and of all persons in trust for him, or for whom he may be a trustee in such lands, shall vest in the promoters of the undertaking, and they shall be entitled to immediate possession thereof, in case such mortgagee were himself entitled to possession."<sup>2</sup>

When such mortgaged lands shall be of less value than the principal, interest, and costs, the value of such lands, or the compensation to be made, shall be settled by agreement between the mortgagee and the party entitled to the equity of redemption on the one part, and the promoters on the other part; and if the parties fail to agree respecting the amount of such value or compensation, it shall be determined as in other cases of disputed compensation; and the amount so agreed on shall be paid by the promoters to the mortgagee in satisfaction of his debt, so far as the same will extend, and the mortgagee shall convey all his interest in the mortgaged lands.<sup>3</sup>

If on such payment or tender any such mortgagee fail to convey his interest in such mortgage, or to adduce a good

<sup>1</sup> Sect. 108.<sup>2</sup> Sect. 109.<sup>3</sup> Sect. 110.

title thereto, the promoters may deposit the amount of such compensation in the bank, which shall be a satisfaction of the mortgage debt so far as the same extends; and the promoters may execute a deed-poll, and thereupon the interest of the mortgagee shall become absolutely vested in the promoters.<sup>1</sup> If a part only of such mortgaged lands be required, and if such part be of less value than the principal money and interest and costs secured on such land, and the mortgagee shall not consider the remaining part of such lands a sufficient security for the money charged, then the value of such part, and also the compensation (if any) to be paid for severance, shall be settled by agreement between the mortgagee and the party entitled to the equity of redemption of such land on the one part, and the promoters of the undertaking on the other; and if they cannot agree, then it is to be determined as in other cases of disputed compensation, and the amount of such value or compensation shall be paid by the promoters to such mortgagee in satisfaction of his mortgage debt, and the mortgagee shall release his interest in the mortgaged lands.<sup>2</sup> If the money is refused when tendered, it may be deposited and a deed executed as in other similar cases.

#### *X. Rent Charges affecting the Lands.*

When any land to be taken is charged with a rent charge, if any difference shall arise as to the consideration to be paid for its release, the same shall be determined as in other cases of disputed compensation.<sup>3</sup> If part only of the lands charged shall be required, the apportionment may be settled by agreement between the party entitled and the owner of the land on the one part, and the promoters on the other, and if they cannot agree, then by two justices.<sup>4</sup> In case of refusal to release, a deposit of the compensation may be made.<sup>5</sup> The charge is to continue on lands not taken.<sup>6</sup>

Sect. 111.  
Sect. 116.

<sup>2</sup> Sect. 112.  
<sup>3</sup> Sect. 117.

<sup>4</sup> Sect. 115.  
<sup>5</sup> Sect. 118.



XI. *Leases.*

When part only of land comprised in a lease is taken, the rest is to be apportioned, if possible, by agreement, and if not by justices.<sup>1</sup> Lessees and tenants-at-will are to be fully compensated.<sup>2</sup>

XII. *Interests omitted to be purchased.*

Another important provision of the act is intended to provide for this class of interests. When the promoters shall have entered upon any lands which they were authorised to purchase and which shall be permanently required for the purposes of the act, and any party shall appear to be entitled to any estate, right, or interest in, or charge affecting such lands which the promoters shall *through mistake or inadvertence have failed or omitted to purchase*, then the promoters shall remain in undisturbed possession of such lands, provided within six months after notice of such, estate, &c., in case the same shall not be disputed by the promoters, or in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters shall purchase or pay compensation for the same, and shall also pay to such party full compensation for the mesne profits or interest which would have accrued to such party during the interval between the entry by the promoters, and the time of the payment of such purchase money; and such purchase money shall be agreed on and awarded in like manner as if such estate, &c. had been purchased before entry<sup>3</sup>, such purchase money being according to the value of the lands at the time the entry was made.<sup>4</sup>

The promoters of the undertaking are to pay the costs of litigation as to such lands.<sup>5</sup>

<sup>1</sup> Sects. 119, 120.<sup>2</sup> Sects. 121, 122.<sup>3</sup> Sect. 124.<sup>4</sup> Sect. 125.<sup>5</sup> Sect. 126.

### XIII. *Superfluous lands.*

Lands not wanted are to be sold, and in default of such sale they are to vest in the owners of the adjoining lands in proportion to the extent of their lands adjoining thereto.<sup>1</sup> But before being sold they are to be offered to the owner of the lands from which they were originally taken or to adjoining owners<sup>2</sup>; but if they decline or neglect to signify their desire to purchase within six weeks, the right of pre-emption is to cease.<sup>3</sup> If any person entitled to such pre-emption be desirous of purchasing such land, and such persons and the promoters do not agree, then such price shall be ascertained by arbitration.<sup>4</sup> On payment of the purchase money the land is to be conveyed by the promoters of the undertaking to the purchaser.<sup>5</sup>

### XIV. *Machinery for correcting Errors.*

There is a machinery not only for making plans of the lands authorised to be taken for the purpose of the railway, but for correcting errors and omissions in such plans. This is to be done by two justices after giving ten days' notice to the owner of the land affected by the proposed correction.<sup>6</sup> The plan of the alteration is to be deposited with the clerk of the peace.<sup>7</sup>

### XV. *Temporary Occupation of Land for the Purposes of the Railway.*

The company may at any time before the expiration of the period limited by the special act for the completion of the railway, enter upon and use any existing private road, being a road gravelled or formed with stones or other hard material, and not being an avenue or unplanted or ornamental road, or an approach to any mansion house, the railway company paying for the use of such road.<sup>8</sup>

<sup>1</sup> Sect. 127.    <sup>2</sup> Sect. 128.    <sup>3</sup> Sect. 129.    <sup>4</sup> Sect. 130.    <sup>5</sup> Sect. 131.

<sup>6</sup> 8 Vict. c. 20. s. 7.    <sup>7</sup> 8 Vict. c. 20. ss. 8 & 9.    <sup>8</sup> 8 Vict. c. 20. s. 3.

The company may also within the same period take temporary possession of lands, without previous payment, for various purposes there mentioned<sup>1</sup>; for the purpose of taking earth or soil by side cuttings, for depositing spoil thereon, for obtaining materials for the construction of railway or other works, and for forming roads thereon; but the company is to give previous notice.<sup>2</sup>

If, however, the owners of the land thus temporarily occupied choose, they may compel the company to purchase such lands.<sup>3</sup>

### XVI. *Additional Stations.*

In addition to the lands authorised to be compulsorily taken, the company may contract with any party willing to sell<sup>4</sup>, for the purchase of land adjoining to the railway, for making additional stations, yards, wharfs, and places for the accommodation of passengers, &c., and for the purpose of making roads convenient for the formation of the railway.

These are the chief provisions of these acts so far as they relate to the lands to be taken by the railway. We shall further consider in subsequent papers the construction which the courts have put on them so far as they have come before them. It will be seen that the great object of the acts is to give a *title against all the world*; and they prove that, so far as a company is concerned, this can be effected safely and properly. As to railways, we can no more dispense with them than we can go without shoes.

<sup>1</sup> 8 Vict. a. 32.

<sup>2</sup> 8 Vict. c. 20, s. 32.

<sup>3</sup> 8 Vict. c. 20, s. 42.

<sup>4</sup> 8 Vict. c. 20. It is not said that the "party" referred to is to have the extraordinary powers of sale given by the Lands Clauses Consolidation Act. See s. 42., where these are given for the purposes of that section.

ART. VIII. — *Report of the Select Committee of the House of Commons on Agricultural Customs.* Ordered to be printed 3d July, 1848. No. 461.

Two subjects, of equal importance to agriculture, are now occupying all men's thoughts, — tenant right, and sanitary laws. The importance of the former to agriculture no man disputes. That of the latter may not be so obvious. It is, however, just as real; for sanitary laws, constructed upon a good plan, would contribute as much to the wealth as to the health of the public. The cleansing of the town ought to be, and, under a good system, would be, the fertilising of the country. With those laws, however, we do not at present propose to meddle; though we feel their vast and growing importance, and are well pleased to see the hold they are taking of the public mind. Our present subject is "tenant right" only.

We do not, however, like the expression, tenant right. It is not a happy one. It is an importation from Ireland, and is calculated to mislead. Captain Kennedy, the secretary to the Irish Land Commission, in the preface to his digest of the evidence taken before that commission, gives this account of it<sup>1</sup>: —

"It appears that the tenant claims what he calls a tenant right in the land, irrespective of any legal claim vested in him, or of any improvement effected by him — that the value of this claim is estimated at different rates in different localities — that it is either openly or silently acquiesced in by the landlords in some districts, whilst it is considerably restricted or absolutely denied by others. In the north of Ireland this system is pretty generally either authorised or connived at by the landlord; and it is not uncommon for a tenant without a lease to sell the bare privilege of occupancy or possession of his farm, without any visible sign of improvement having been made by him, at from ten to sixteen, up to twenty and even forty years' purchase of the rent."<sup>2</sup>

<sup>1</sup> Digest, pt. 1. Introd., chap. i. Thom, Dublin, 1847.

<sup>2</sup> A large Irish landed proprietor thus alludes apparently to this custom.

Now this is not what we mean when we speak of tenant right. What we mean is, the right which in justice every man ought to have, — the right, in the absence of express and clearly understood stipulation to the contrary, of enjoying the benefit of any improvement effected by his own outlay of capital. Of course, if a landlord and tenant have come to a clear and distinct agreement, as to the terms upon which the land shall be held, and that agreement has been reduced into writing, it must be binding on both parties, so far as it speaks, and any interference with its terms, any substitution of other terms, founded on fanciful notions of what justice or even policy requires, would be both unjust and tyrannical. Where, therefore, there is a written agreement, its stipulations must be religiously adhered to. But in England there is a vast quantity of land held either without any written agreement at all, and therefore under the general law of the land, or with written agreements, speaking only to a certain extent, and leaving, therefore, all matters not expressly provided for by the written agreement, to be governed by the general law of the land, or by the custom of the country. Now what we contend for is, that the law of the land is a short-sighted law, that it was established in times when landlordism was supreme, both in the legislature and on the judgment seat, and that it has consequently established principles and rules which, being of a one-sided nature, defeat the very objects they seek to attain; and that the law in its result is equally mischievous to the landlord, the tenant, and the public.

Under the present law no tenant ever does or ever will make the necessary buildings<sup>1</sup> on his farm at his own expense, for it is contrary to human nature to sow that another may reap. But not only will the tenant not build — he is

Speaking of the *late* Marquis of Londonderry, the present Marquis says: — “He (Lord C.) established with more security than even his predecessors the invaluable understanding of tenant right between him and his farmers, to which the extraordinary prosperity of the Irish estates up to that last troublesome trial is virtually owing.” (Marquis of Londonderry’s *Memoirs of Viscount Castlereagh*, vol. i. p. 71.)

<sup>1</sup> See the familiar rules as to this stated, 7 L. R. 377—379.

even unwilling to repair. The law generates a general feeling of hostility in the tenant's mind; a disposition to let every thing lie neglected — to let every thing go to "rack and ruin" — rather than aid the legal robber, by exerting oneself under a law which says, that while one man makes the outlay, another may reap the benefit.

The decision in *Elwes v. Mawe*, affirming the principle that what a tenant has once annexed to the farm is not legally separable from it, because it has become the property of the landlord, subject only to such temporary interest as the tenant may have in the land, involves, of course, the still more important point, that no landlord or incoming tenant can be compelled to pay any thing for agricultural improvements not capable of separation from the farm, such as draining, subsoiling, boning, guanoing, marling, claying, &c. These improvements have all sunk into the soil, and the soil is the landlord's. They are, therefore, forfeited to the landlord.

This principle being of an all-pervading nature, it becomes most material to inquire, whether its tendency is to promote or impede the public prosperity? Now we do not hesitate to express our opinion that this principle is not only not right, but that it occasions the greatest mischief to all parties concerned — to the tenant, the landlord, and the public: to the tenant, because it deters him from farming with spirit; to the landlord, because its tendency is to ensure him a tenant of little capital and no enterprise, and therefore poor; and to the public, because it deprives the public of all the food which better and more spirited cultivation would produce. Then does it benefit any one? Does it benefit even the landlord? Surely not. It is said, "cheating never thrives," and such a law is really cheating. Imagine the case of a tenant at will draining land, and being then turned out and told, he shall not be allowed one farthing for his drainage. It is notorious that the benefit of draining is scarcely felt the first year. It begins to be felt the second; but it is not really paid for till after the third or fourth crop. Yet by the tenure under which an immense extent of land is held in England, a tenant who has drained his land may be turned

out, without a farthing of compensation, upon a six months' notice. We ourselves were once subjected to this injustice. We lived in a hired house: the field, or what Mr. George Robins used to call, the park-like ground, in which the house stood, was very wet, and we determined to drain it. We had no lease, but we trusted to the honour of the owner (who was a gentleman of large fortune), in the confidence that he would be incapable of turning us out at a short notice; but we discovered, to our cost, that in trusting to his honour we had trusted to a very brittle thing. It suited him to let the land to somebody else, and he turned us out without one farthing of allowance, or even an expression of regret. If such a thing had been done to a farmer, it would soon have been noised about at the market-table, and would have struck such a terror into the whole body of farmers in that district, that not one would have dared to trust his landlord, or would have made any improvement, without a lease, for the next ten years. For it is one of the great evils of a piece of paltry knavery of that kind, that it creates universal distrust. The evil is not confined to the person who commits the baseness. It spreads far and wide; for no one knows whether even the most respectable landlord can be trusted. A feeling of insecurity thus springs up. Now all this is a great and a practical evil, and we see the effects of it every day. We see land that ought to produce four and five quarters of wheat to the acre, so wet and so ill-cultivated that it does not produce above two quarters or two and a half, and very often not even two. And we see, also, that whilst capital flows in boundless streams into the manufacturing districts, it seems to be completely dammed out of the agricultural districts. Here and there, indeed, we find a liberal landlord, a thriving tenantry, and a spirited cultivation: but such cases are the exception, and not the rule; and the reason is, that the majority of men will trust the law, and will trust nothing else. If the law gives them clear rights, they will reckon upon them, and act accordingly. But most men will not place themselves at the mercy of another man's honour. They like legal rights, and on nothing else will they so far rely as to risk that precious coin which "every body nurses." If

you talk to them of honour, and liberality, and spirit, they shake their heads; but if you talk to them of legal rights, or a lease, they prick up their ears. Now landlords are not very fond of leases. They think, and with reason, that a lease binds the landlord, and bankruptcy will, at any moment, unbind the tenant. We agree with them. But, agreeing with them, we cannot but say to landlords, If you do not like leases, *let the law itself be as good as a lease*; let the law be founded on the great principles of justice, and then the majority of farmers will cultivate with spirit, without wasting their money upon leases stuffed with law verbiage.

We had written thus far, when we received the report of Mr. Pusey's Committee on Agricultural Customs. We have read it through, and it gives us great pleasure to find that the views we have above advocated are substantially supported both by the report and the evidence. With respect to the removal of buildings and fixtures put up by the tenant with his own material, it seems to be admitted on all hands<sup>1</sup>, that an unrestrained right of removal should be conceded to the tenant, and accordingly the Committee, after stating,

“That the law, with respect to things affixed to the freehold, is different and more beneficial (to the tenant) as regards those annexations made for the purposes of *trade*, than those made for the purposes of *agriculture*, an outgoing tenant being permitted, in many cases, to remove the former, when erected by himself, but not the latter;”

reports,

“That this distinction does not appear to be supported by any sound reason; and your Committee are of opinion, that the tenant's privilege of removal, with respect to fixtures set up for trading purposes, should be extended to those erected for agricultural purposes.”

<sup>1</sup> This recommendation is in conformity with the Report of the Law Amendment Society, printed 7 L. R. 37. [It is proper to state that the chief merit of the Reports on Landlord and Tenant, is due to Mr. Thomas Henry Farrer, of the Chancery Bar, who drew up both Reports. Ed.]



Of course this would only apply to such as were erected at the tenant's sole expense.

. This is a great step in advance, but its importance is as nothing compared with that of securing to the outgoing tenant such allowance for spirited and *useful* cultivation, as will induce him to watch the operations of enterprising neighbours, and adopt all those improved methods of cultivation, however expensive, which promise a sufficient return. On this point we regret to see, that the Committee are disposed to give their sanction to the do-nothing policy of the day,—to that sickening feebleness, now so common, which consists in leaving every thing to the “good sense and good feeling” of mankind, and “the gradual progress of enlightenment.” It is by these plausibilities that the enactment of good laws is now defeated. The old law is admitted to be wrong, but the anti-reforming spirit, when it can no longer resist the weight of evidence, practically retains the mischief, by suggesting, that the good feeling of mankind will sufficiently counteract the mischief of the law, and that therefore legislative interference is not needed. This seems to be the view of one of the most practical and sensible men in the House, Mr. Henley, and we regret to see it, because his influence is every day increasing, and deservedly. Yet such was the whole tenor of his examination. To every witness, who recommended the establishment of a good system of allowance, he addressed a series of questions, the object of which was to obtain admissions, that all which those witnesses recommended might be obtained by agreement. Of course it might, but still that is no reason against having a good law to provide for those cases, for which agreement does not provide. Suppose that the law were, that whenever a person died without a will the whole of his property should go to the Crown, or to his next door neighbour, and it were proposed to make a law distributing it in cases of intestacy amongst his wife and children, would it be any answer to such a proposal to say the proposed change was unnecessary, because every man might make his will and give his property to his wife and children? Surely not. The wise policy is to have a good law for those cases, for which the foresight

and activity of individuals does not provide, and to let individuals supersede that law, and make any other arrangements which their own view of their own interests may suggest to them as more desirable. In the case we are now considering the real question is, whether it is better for all parties, — for the landlord, the tenant, or the public, — that, *in the absence of special agreement*, unexhausted improvements shall be allowed for to an outgoing tenant, or that they shall all be forfeited to the landlord. By the law, as it stands, they are forfeited; by the law as proposed by farmers, by land-agents, by enlightened landlords, by all men capable of perceiving that men will not sow that others may reap, they would be allowed for. Can any rational being doubt which system would be best? The one would encourage good cultivation, the other discourages it. Our space will not permit us to cite the abundant evidence given on this point by practical men, we will therefore, selecting at random, give the words of Mr. Owen, a Berkshire land-agent: —

“I am convinced of this, that where landlords cannot make improvements, there are so many cases where the tenant has the means of making them, that he could make them very much to his advantage, and very much *to the landlord's advantage*; because I consider that, under the present system in our country of letting farms, farms are what we call BEGGARED OUT. There is not a farm that I have relet, but every tenant who has quitted, has taken every thing out of the farm that he possibly could. If a system could be laid down, where that never could be allowed to be done, and any outlay that the tenant had made upon that property, whether they were improvements by building or manure, he should have the certainty of being repaid for them, I think the benefit would be *immense, both to the landlord, and the tenant, and the public.*”

Many other witnesses explain, that the benefit to the public would be twofold; first, in greatly increasing the demand for labour, and thus diminishing rates; and secondly, in greatly increasing the supply of food. Is it not lamentable to think, that landlord prejudices, that an inconsiderate dread of being compelled on some rare occasion to pay for unexhausted improvements an inconvenient sum, — a case which

would probably not occur above once as to each farm in half a century, or even so often, — should be allowed to impede the good of the public, the good of the tenant, and the good of the landlord himself?

Some of the witnesses, it is true, not so wise, as we think, as others, — men who would force their own views down other men's throats, because *they* have an undoubting conviction that those views are right, — would make the law *imperative*. Mr. Hutley, a practical farmer, is asked (2295.), "Would you make it *imperative* on the landlord that he should let his land subject to certain covenants?" He answers, "Yes." Mr. Outhwaite is asked (2784.), "Should the tenant and landlord have power to keep themselves out of the operation of the law by agreement?" He answers, "No." These gentlemen are evidently for tyranny. They would not allow patients to decline their physic. But this is not the way to treat grown-up people. Men may treat their own children so, but they must not so treat their grown-up neighbours. The law may advise, but it must not compel. "If that were the case," adds Mr. Outhwaite, — that is, if the parties interested might make a bargain for themselves, — "the law would not do any good!" Why not? Surely a law does good, if it is a good law, and provides for all cases not provided for by the written arrangements of the parties themselves. To recur to our former illustration, does not a law "do good" which makes a judicious will for a man who is too idle or thoughtless to make one for himself? And does it neutralise the good, that the same law, which makes a will for him, if he makes none for himself, recognises his right to make one for himself? Before the statute of distributions was passed, if a man died intestate, his personalty was distributable for the good of his soul, we believe; and of what was good for his soul some ecclesiastical authority was deemed the fitting judge. To amend this strange state of things, the statute of distributions, by which the personalty of an intestate was made distributable amongst his next of kin, in certain proportions, was proposed by the Pusey of the day, the lover of justice; the Messrs. Hutley and Outhwaite of the day would have said, we presume, "You must make the new statute

*compulsory*, or it will do no good!" But wiser men said, "Establish the proposed law. It is a good rule of distribution; and let those who do not like it make a will for themselves." In like manner, we say, "Establish the proposed law. It is an honest recognition of the real principles of justice, and let those who do not like it make an agreement for themselves." If agriculture is to be conducted on a basis of wrong, at all events let it not be under the sanction of a general law. Let it be by special agreement, and in defiance of the general law. The shame of such an agreement should fall on him who made it; it ought not to have the sanction of public authority. When Mr. Outhwaite said that such a law would do no good, he showed himself ignorant of human nature; he evidently knew not how strong is the disposition of all men, living in a civilised state, to conform to those principles which the law sanctions. Let the law sanction baseness, and too many will be base; let the law discountenance it, and even the basest will feel themselves controlled. They will not brave public opinion. Even Mr. Outhwaite, however, would not deny, that tenant right, where it prevails, as in Lincolnshire, is a local right, and is yet supersedeable by special agreement. How then could he, in consistency, contend that a general law should not be equally supersedeable by private agreement?

All we ask is, that the *general* law shall be on a good footing, not a bad one; that the law shall establish that, in the absence of agreement to the contrary, unexhausted improvements shall be paid for to the outgoing tenant, according to fair valuation, instead of being, as they now are, forfeited to the landlord. And because our anxiety is great to see a general law established, which would be, we are sure, in the long run, so beneficial to all parties, by encouraging, instead of discouraging, good cultivation, we vehemently protest against the absurdity of those witnesses, too many, we grieve to say, besides those adverted to, who would make the law a despot to control, instead of being an adviser to suggest.

There are, however, plenty of witnesses who see the matter in its proper light. Mr. Owen was asked by Mr. Henley (4606.), whether "the law should override leases?"—"No,"

said he, boldly. "Should landlords have the power to make agreements with their tenants not to come under it?"—"Yes, certainly." Then," said Mr. Henley, "What would be the use of the law?" Mr. Owen was puzzled by this question of his astute interrogator, and answered, "There is a difficulty, I can see, and have always seen it." Now there really was no difficulty at all. The proper answer would have been to have asked Mr. Henley another question,—namely, whether the power of a testator to make a will was any objection to the statute of distributions.

We have laboured this point, perhaps, to wearisomeness, but we have done so because we believe that it is *the* point in which the misunderstanding is greatest, and in which a clear understanding is of the greatest importance. Our view assumes that principle, which is enunciated by the maxim of the old Roman law, "*conventio vincit legem.*"

That the present system is in the highest degree mischievous, is established by ample evidence. It is a very common, and apparently plausible argument, and especially amongst the higher classes, that the good feeling which subsists between landlord and tenant, is a sufficient security to the tenant. It is said few landlords are capable of taking so unfair an advantage of an enterprising tenant, as to turn him out on a six months' notice, allowing him nothing for unexhausted improvements. We readily admit this, in spite of our own experience to the contrary. We have the highest opinion of the landlords of England. We wish we could say as much of the landlords of Ireland. But even in England, there are examples of baseness, quite sufficient to terrify a whole body of farmers, collected at the market-table, and listening to each other's stories. The witnesses who refer to cases of unfair treatment, carefully abstain from names; and our space will not permit us to give details. The cases, however, are to be found by referring to the following questions, 2432. 3430. 3434. 4167. 4425. 6588. It may be said that the instances are few; but it must be remembered, as we have above observed, that although but one landlord does the wrong, the fame of it flies all over the country, and strikes terror far and wide. "It is the general

talk at market," says Mr. Beman (4186.), "that, if they were better protected, they would lay out more money, which they do not feel justified in doing now, because they know that men who have done it have been taken advantage of. I do not think it safe to do so." The great evil is, that the law in strictness sanctions such taking of advantage; and hence, if a landlord does it, he is not publicly condemned. His argument, "I only asserted my rights," silences objection. The feeling is, "May not every man do what he likes with his own? What right have we to find fault with a man for doing that *which the law sanctions?*" And hence the mere reversing of the principle of the law would be an inestimable advantage. But besides the cases which occur, and are really cases of ungenerous conduct on the part of the landlord, there are a vast many which occur more by accident than design. The landlord is tenant for life — he dies, and the remainderman thinks himself entitled to relet the lands; or the landlord is tenant in fee, and his heir succeeds him, who is under no obligation; or the landlord is an embarrassed man, and a mortgagee or purchaser steps into his shoes, and they feel themselves free as air. In short, when a tenant comes to count the risks, they are so many, that if he is of a cautious disposition or unwilling to spend money, he will find plenty of plausible reasons for clinging to the system of his forefathers, and cultivating the land no better.

One strong objection which has been started to the system of allowances, has been the difficulty of getting them valued. This difficulty was frequently put to the witnesses; most of them seemed to admit that the difficulty was considerable; and one witness, Mr. Boniface, the agent for the Duke of Norfolk, speaking of the Sussex system, said, (7052.),

"That where the valuations were for things done in previous years, there was great danger of false claims being made, supported by false evidence."

No doubt this difficulty is a formidable one. Still, we doubt not, it might be vanquished; and at all events it ought never to be forgotten, that it is a difficulty which can only occur *once* during the tenancy, and the advantage

of good cultivation recurs every year; every year of good cultivation the tenant grows richer, the rent is better paid, labourers are better employed, and the public is better fed; and against all this is to be set only an occasional mischief, an occasional piece of knavery. The mode of valuing universally recommended, is the appointment of one valuer for the outgoing and another for the incoming tenant, and a third to decide between them if they differ. To this it has been objected, that where the nomination of the third has been left to the two original valuers, the matter has been too often decided, not by mutual agreement, but by tossing up for choice, and the winner of the toss nominating a valuer known to value either favourably for the outgoing, or favourably for the incoming tenant. If so, the choice of the third man should be made in some less objectionable mode; and no doubt the farmers of every district could amongst themselves agree upon some better mode. A better one, perhaps, might be to have a list of umpire valuers nominated by the farmers of the district each year, from which the other valuers should be obliged to select their referee. At all events, the difficulty is not so great but that experience and ingenuity might overcome it. A reference to any court, acting according to legal forms, and examining witnesses on oath, would be absurd, though it might be reasonable to require the outgoing tenant to make out an exact specification of his claim in writing, as recommended by most of the witnesses; and make a declaration affirming the truth of the facts stated in support of his claim; and it would not be unreasonable to provide, that if he made any wilful misstatement his claim should be forfeited. It might also be provided, that the valuers should fix a price to each item.

Much inquiry was made of witnesses, as to the principle on which the valuation should be made; whether the incoming tenant should pay for outlay, or pay for the beneficial results of outlay; but upon this point all the witnesses, farmers and land agents, were agreed, that no tenant should be paid for foolish expenditure. It was admitted that the expenditure must be, in the estimation of the valuers, beneficial; and it seems to have been also agreed, that no more

need be charged against the incoming tenant, than would suffice fairly to compensate the outgoing for the money expended by him, after deducting what he had already obtained by the increased produce of the land. Hence, if an outlay of 5*l.* per acre had improved the land to the extent of 10*l.* or 15*l.*, neither the incoming tenant nor the landlord was to be charged to the extent of the 10*l.* or the 15*l.*, but only to the extent of the 5*l.* with the common profit, as money used in trade.

There was one point in which every witness agreed, farmers included; and it showed, we think, strongly the fairness of their minds: and it was, that dilapidations should be set against alleged improvements. Upon this point we were much struck by the evidence of Mr. Lattimore.

"2450. Q. That which you seem to desire most is an increased facility for recovering compensation for improvements?—A. Yes. I think what we require is, that the law should hold the balance *equally and fairly* between the landlord and tenant. I have already said, that, in several instances lately, the landlord has brought a claim for dilapidations against the tenant, and in each case he has recovered it; but I never knew of cases (and I have inquired of all the valuers and practical men in my country) in which the tenant recovered (for improvements), if the law was disputed. Many of our landlords are good and just, and do not dispute; but where they do, we never get compensation. *I want the law to be equal between the two*: that if the landlord should have the power (I do not object to it) of suing his tenant for dilapidations and waste of property, it is equally just, that the tenant should have a similar claim upon the landlord for improvements."

Another point suggested by members of the committee was, that the paying for improvements would impoverish the incoming tenant and deprive him of great part of his capital. "Has it ever occurred to you," asked a member of Mr. Hutley (2264.), "that in giving a tenant right there is this objection, that the incoming tenant has to pay a large sum, when the greater part of his capital is required to stock his farm?" "It would not," said Mr. Hutley, "take so much money as people think." Now this was not, in our opinion, the proper answer; for it cannot be material whether it costs much or



little *to do justice*. A better answer would have been that in the great majority of cases the incoming is also an outgoing tenant, and that if he is a good tenant he will have received, as an outgoing, what he pays as an incoming tenant. But almost every witness stated that incoming tenants would much rather pay for improvements already made, than have to make those improvements themselves.

“ ‘That would be a very large sum to take out of the tenant's pocket who came to the farm,’ said a member. ‘He would be very glad to pay it,’ answered the farmer witness. Another witness having said, ‘a tenant would rather take a farm with those improvements than have to make them himself,’ was asked (3965.), ‘Why would a tenant rather, &c.?’ ‘Because,’ said he, ‘where drainage is done, it is a very considerable cost; and it is perfectly well known, that, after land has been well drained *a while*, it is permanently improved; therefore he would be in a better condition to take it after four, or five, or six crops had been taken, than to outlay the capital. *The incoming tenant never scruples at paying for those improvements.*’ ”

In truth, the incoming tenant gets improvements at second hand price instead of paying for them at first cost.

We have before declared our own preference of tenant right to leases. We are glad to see that the generality of the witnesses examined have the same feeling. Many of them declared that they did not like to be bound down to pay fixed rents for fourteen and twenty-one years, not knowing what changes might occur in prices. All, without exception, declared that leases did not ensure to the landlord his property being returned to him in a high state of cultivation; on the contrary, they said that the common system under leases was for the tenant to put as much into the land as he could in the early part of the lease, and to take as much out of it as he could during the latter part, so that, to use the phrase above quoted, the land was returned to the landlord “*beggared out.*” This was done, whether the tenant wished to stay or wished to go; for if he wished to stay, he did it with a view to get his lease renewed at the old rent, and if he wished to go, he did it that he might get as much of his capital back as possible. The witnesses might have

added another reason,—that human nature revolts at injustice ; and it is really injustice, that one man should derive the benefit of another man's outlay, unless it has been clearly and expressly stipulated for.

In conclusion, we will only observe that these are not times in which it is wise to perpetuate a system under which ill-feeling is likely to exist between landlord and tenant. There is a powerful class which cares little for either, which cares not from what source food comes so long as food is cheap enough to render low wages possible, and thus increase the sale of manufactures. If the views of this class are to be counteracted, it must be by making home-grown produce cheap, and that can only be done by that sort of improved cultivation which makes two blades of grass or corn grow where before only one grew. For this we must trust to the spirit and enterprise of cultivators. The owners of the land will ever be comparatively inactive. As a body, they are too wealthy, and too much engaged in the pursuits of pleasure to devote their whole energies to the subject. Some may, but the class will not. The result, therefore, must be looked for from the class of cultivators, and their enterprise and diligence can only be stimulated to the highest pitch by the law establishing, as its principle, that he who sows shall reap, not, however, interfering with the ancient maxim "*conventio vincit legem*."

Though the subject is very far from being exhausted, our limits compel us to stop ; and we cannot, as we think, better conclude this article than by quoting the following questions and answers from the evidence of Mr. Smith.

" 5105. You have described the system of giving compensation for various manures in your neighbourhood ; has it a good effect upon the farming of your neighbourhood ? — It has a very considerable effect. On those estates where this kind of understanding has been encouraged, they have been improved much faster than others ; where landlords have held aloof from the matter, there has been no such improvement ; we could not compel our landlords to enforce this compensation where they have an objection to it ; it is the *custom* of the neighbourhood, but there is no *law* to en-

force it. There have been cases where confusion has been created; not very often, but it has been so.

"5106. Where the right is admitted, there is no confusion in adjusting it; but where the right is disputed, then that confusion is produced? — Yes; the landlord says, 'I know nothing but the law of the land;' and if you get a tenant who says, 'Well, I shall take no more than my landlord will take of me when I leave,' there comes a difficulty.

"5107. Where the right is admitted by the landlord, and it is a mere matter of settlement between the outgoing and incoming tenant, it is perfectly easy? — Perfectly easy; there is not the slightest difficulty, and there the estate is improved considerably.

"5108. Can you speak positively as to the high state of cultivation that prevails in those cases in your district? — All the estates that have upheld this principle improve faster than the others.

"5109. And those estates are in a satisfactory state for the landlord and for the tenant? — Yes, *and the rents have improved very considerably too*; it must fall back into the fee of the land, the buildings, and the employment of manure; it must come to the benefit of the estate ultimately.

"5110. You can speak positively that not only the farming has been improved, and the farmers have done well upon this system, but that the landlords have done well too, by receiving an increase of rent? — Yes, most assuredly; in some instances almost double, and the tenant has thriven too; wherever the tenant does well, the landlord does well; where the landlord is disposed to grind, the tenant does not well, nor the landlord; the more liberally the tenant is treated, the more confidence he has; and if there was a law so that there should be no difficulty in quitting, the district would improve much more than it has done, though it has improved so largely.

"5114. *Mr. Newdegate*: You have been speaking of customs; do they prevail only in certain districts? — They prevail in our neighbourhood to the extent of forty miles.

"5115. They do not have the force of law? — None whatever, that I know of; that is what we are seeking; it is the want of the force of the law that creates the difficulty. We have no law; we have a custom that honourable landlords uphold; but if you get a landlord not disposed to uphold that honourable understanding, the law is dead against you."

ART. IX. — FRENCH AND ENGLISH LAW OF  
EVIDENCE.

WE have more than once or twice had occasion to remark upon the singular want of sound views on the all-important subject of evidence which the proceedings of the French courts hardly ever fail to exhibit. We now find that the same defect extends, as indeed might easily be supposed, into the proceedings of an inquisitorial or legislative or administrative description. The late report of the Commission of Inquiry is full of instances similar to those which a year ago we pointed out in the celebrated Praslin case.

We must begin by stating, that as regards the admission or rejection of proofs, a marked distinction is to be drawn, and to be kept constantly in view between proceedings for adjudication and proceedings of police. In the former, the strictest exclusion of rumour, hearsay, opinion instead of fact, is to be observed. In the latter, every thing may be received which can put the police and those exercising the functions of detectors and accusers, on the track in order to discover the offender, the *corpus delicti*. The ground of this distinction is obvious. Courts that adjudicate pronounce finally on the matter brought before them. Courts of mere inquiry do nothing of the kind; they only endeavour to find out what has been done and who did it. The former courts determine the question, guilty or not guilty? the latter only determine who is so far likely to be implicated that he may be tried. "Guilty or not guilty" is the issue in the one; "try or not try" is the point in the other.

But then it will be said, why object to the late Commission of Inquiry that hearsay was allowed to be given in evidence before it? For this obvious reason, that it did a certain act and one of great moment; it was not satisfied with reporting an opinion, it reported all the evidence taken, and the whole was printed and published by the Assembly. Had it stopt short at merely giving its advice that MM. Caussidière, Louis

Blanc, and Ledru Rollin, should be tried, no one could have objected to their having taken hearsay evidence or grounded on it their opinion. They did much more, and by hearsay these individuals are held up to the country as guilty. Two of them, indeed, have chosen to fly from trial; they, therefore, may have little right to complain. But M. Ledru Rollin has unquestionably been aggrieved. He is all the more aggrieved because, not being put on his trial, his character is assailed in an official document, and he has no convenient opportunity of clearing himself.

We give one or two instances. The Commissioners allowed witnesses to tell them that being in the mob of insurgents they heard some persons say they expected Caussidière to come, and head them or help them. But Caussidière was not present when these words were spoken, neither was any proof given even to attempt bringing home to him the knowledge of any such words ever having been spoken. So his name being put on placards as fit to be raised high in office, is given without even the attempt to bring home to him the knowledge of any such placards.

In like manner, a witness says he had heard that Ledru Rollin took money from the treasury and sent it over to make purchases or investments in England. It is said, too, that his wife told some one of 14,000*l.* sterling being so sent, and a person is mentioned as able to tell all about it, but that person is not called and examined.

This is really intolerable. M. Ledru Rollin is now most properly bringing his action for defamation against certain editors and printers of journals for thus assailing his character. He has a right, therefore, to benefit by the presumption that he is guiltless. But he has also a right to complain of the Commissioners for having recorded and reported the charge.

Far indeed from our intention is it to pronounce any eulogy upon this noted individual. But it is exactly because he is tainted with other stains that attacking him becomes the more safe and easy; and the abuses, the perversions of the law are seldom ventured except on the persons or the characters of such men. We may add that it is remarkable how silent he was on this charge in his defence against other

charges. It would have been as well had he, in the face of the National Assembly, taken an early occasion to deny the whole. It was certainly the charge which an English statesman would have been the most forward to repel.

But how strange to perceive such men as Odillon Barrot, and Berryer allowing hearsay in these cases, as if it were proof. There seems no idea in their minds that a man unknown and unseen, and of course subject to no cross-examination, has only to tell another whatever he chooses, and then that other, who of course knows nothing, and can only be cross-examined as to his recollection of the conversation, may come into court and depose the whole. Mr. Bentham, we believe, had an idea of the same kind. He was for letting all that any one could collect in any way be given in evidence, and leaving the court to weigh its value; totally forgetting, that if courts are composed of men and not of angels, their minds, and therefore their judgments, must inevitably be affected by what they hear, and that the evidence is in truth, not that the party did so and so, but that some one said he did. Now, some one, or some thousands, saying he did is not the least proof whatever that he did it. To be sure, Mr. Bentham's notions of judicial procedure were about as fantastical as ever entered into the mind of a learned and most able man,—a man too, on all subjects, save judicial procedure, peculiarly acute, but on that one he was blinded by the preconceived opinion, that every thing established was wrong; that whatever is, is wrong. We give one example which is in his writings, and therefore nobody can gainsay the assertion that it is his opinion. There must be no cross-examination, but what he termed *undequaque* examination—that is, all the spectators present at any trial were to propound whatever questions they pleased, and the court to make the witness answer them all. No man of common reflection, assuredly no one who had ever been in a court of justice, can fail to perceive that such a system would bring any cause and any court to a stand still in an hour.

While on this subject of evidence, we may notice some defects of our own law in this respect. Lord John Russell

was lately in Dublin; and being on the point of embarking to return from his short visit to that capital, an attorney found means to see him at his inn, and handed him a subpoena to give evidence on the trial of Smith O'Brien. His offer of the expenses of a jury was courteously refused by Lord John, and he prepared, on the approach of the Clonmel Special Commission, to set out for that place. He was stopped by a letter stating that his attendance would be dispensed with. We know of other cases in which the witness, or pretended witness, was allowed to undertake a long journey, and was not even called by the party who had served him, or caused him to be served with the subpoena. We are now to consider the defects of the law and practice in this particular; and we must first begin by stating what the law is, before we show in what way it may be, and doubtless frequently is, abused.

If in a civil suit a person is served with this process, his reasonable expenses must be tendered to him at the time, in case, says the law, he may attend, and not be called, so as to profit nothing by refusing to be sworn until his expenses are first paid. But in criminal cases it is otherwise, at least where a witness is subpoenaed for a defendant in person; for should he refuse to attend, he is liable to be attached by his body, although no tender at all of his expenses has been made.

But again, whether in a civil or in a criminal case, no allowance whatever is made for the witness's loss of time. This was decided by the Court of King's Bench, in *Moore v. Adam* (5 M. & S. 156.), and by the Common Pleas in *Willis v. Peckham* (1 B. & B. 515.), and other cases, although a kind of exception to the rule has been made occasionally in favour of attorneys and medical men. (See *Moore v. Adam*, above cited.) But this we take not now to be law. (*Collins v. Godefry*, 1 B. & Ad. 950.) Indeed even an undertaking to pay for loss of time has been solemnly decided to be immaterial, as it would (said the Court of B. R.) be a promise without any consideration to support an assumpsit. (*Collins v. Godefry*, cit. *suprà*.) Now it is to be observed, that even if a witness is paid his full expenses, to a man engaged in a

lucrative business, this is nothing compared with the loss of his time which he incurs by obeying the subpoena: but even were he paid an ample compensation for the loss of time, what is that to the ruin that may befall him by a day's absence at a critical moment of his most important mercantile operations?

We thus may perceive how liable to abuse this power of serving subpoena is. A common person is exposed to the greatest vexation, and even risk of ruin, by payment of his travelling charges. Whensoever any one is on his trial for any offence, and has a grudge against him, the subpoena has only to be served; and though no tender of his expenses accompany the service, he must repair to the assize town at his own cost and charge, or he will be liable to certain imprisonment under an attachment. A man in better circumstances is exposed to equal annoyance and vexation, for he may be pursued from the Land's End to Newcastle; and after travelling a thousand miles, he may find he was summoned merely for the purpose of giving him trouble. Nay, he may have spent 100*l.* without the possibility of receiving one-fourth. A man in business may be served to all but his ruin in cost and in risk of damage.

Now let us observe how this power of annoyance may operate in the hands of unprincipled persons. We have known merchants say they had rather pay the sum in dispute between the parties, than go from Liverpool to Lancaster and wait three or four days till the cause was called on. Then if such be men's feelings, on a mere calculation of profit and loss, will not low practitioners avail themselves of the power of summoning, to make witnesses who can afford it buy themselves off? "Your evidence would increase or lessen my client's damages 50*l.*, we calculate." "Then here are five and twenty," says the person threatened with a subpoena, and men will do things for a client which they would not for themselves. But low members of the profession are very likely to act as the principals in such cases. It is a power so open to abuse that it ought not to exist.

If asked what remedy suggests itself, we can only point out a very obvious one—that a judge or commissioner should



authorise the issue of every subpoena a certain time before trial. This would give a person summoned the power of sending an affidavit that he was wholly ignorant of the subject—or had some other grave objection to attending. Thus we happen to have known more than one person in a judicial situation served with subpoena,—probably through the ignorance of practitioners that in such cases a judge cannot be allowed to give evidence—we mean to prove matters—that had passed before them sitting as judges. Yet if they refused they made themselves liable to attachment. Of course the only restriction which we suggest is, that unless a judge's fiat backed the writ, no attachment should issue, nor any penalty (100*l.*) be exacted. The person served would still be liable to action at law.

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#### ART. X. — NOTICES OF NEW BOOKS.

[We propose, under this head, to give some account of the new and important works published within the quarter. The desire to discharge that debt which Lord Bacon has said every lawyer owes to his profession, is now so exceedingly strong, that this will be attended with some difficulty; but we shall do our best.]

I. — *A Letter from Lord Denman to Lord Brougham on the final Extinction of the Slave Trade*, 8vo., pp. 79. London: Hatchard, 1848.

THE appearance of a letter addressed by the Lord Chief Justice of England to an ex-lord chancellor must, as a matter of course, attract the earliest notice of the "Law Review." But into the merits of the political questions handled by his lordship we cannot enter; they belong to another forum than ours. We are confined to the legal matter of the discussion; and before entering upon that, we shall only call the attention of our readers to the whole of this honest, eloquent,

and powerful work — one worthy of the noble author's high name, and of the great station which he fills as the head of the Common Law. He is induced to descend from the Bench which he adorns, in order to defend, not himself, but the great cause of humanity and justice, as our statute book describes it.

Our province of Law Reviewers forbids us to enter into the merits of the controversy as to the policy of keeping up our present coast defence against the slave trade. We hasten, therefore, to the legal points of the question the more, because we may leave the others in the Lord Chief Justice's powerful hands. That matter, however, is of great moment, and we proceed to state in what manner the point arises.

Among the witnesses called by Mr. Hutt (the chairman of the committee on the slave trade), and the opposers of the coast squadron, to prove the hopelessness of all attempts by law to extinguish the traffic, was a certain Dr. Cliffe. He declared himself to be a native and citizen of the United States, but settled in Brazil. He also stated that he had for some years been actively engaged in slave trading on the African coast, and that he had made a fortune by its enormous profits. When asked in what years he had been so engaged, he declined answering the question, for an obvious reason; but shallow was his speculation, for the refusal answered it, and showed that he had been engaged since the traffic was put down by law. Indeed, his subsequent statements on other points let out the fact that his slave trading extended within the last ten years, when it was declared by the law of the United States to be punishable with death. He had the audacity to tell the committee that he gave it up from motives of humanity, not wishing any longer to engage in so cruel and murderous a traffic. But every sentence of his evidence gave the lie to this assertion, by showing his anxiety for the liberty to prosecute it unrestrained. He, moreover, admitted that he now possessed 200 slaves, the fruits of his slave trading; added that he was anxious to obtain 500 more, as necessary to complete his gang for Brazil sugar planting. He also refused to tell by what means the traffic could be effectually suppressed, stating that it

would injure the trade in slaves, if we knew these means, and resorted to them. The honourable chairman kindly threw out a suggestion to save his witness, whose humanity he had commended in one question. He said, "you like not to tell these means, for fear of exposing yourself to the prejudice and passions of the people amongst whom you live?" The witness rejects the plan of escape courteously held out to him with a "no; but, &c. —;" and then gives another reason.

Now this description of himself by Dr. Cliffe gave rise to great comment, by both Lord Denman and Lord Brougham, in the debate of 22d August last, in the House of Lords; and the advocates of this person were exceedingly wroth with these noble lords for charging him with felony; "because," said they, "he is a domiciled Brazilian, and naturalised in that country." Lord Denman (p. 27), cites the solemn denunciation of slave trading by Brazil in the treaty of 1830, whereby whoever shall engage in slave trade is to be "deemed and treated as a pirate," and Dr. Cliffe says, in his evidence, that at least as late as 1841 and 1842 he had committed this act so denounced as piracy by the law of the country in which he is resident. Indeed, if he or his advocates should persist that he was not a Brazilian since 1836, then they lose the benefit of his supposed naturalisation; for of course he must have been a subject of the United States. However, we put the case upon higher grounds. We affirm that, wherever he resides, or in whatever state he is naturalised, he is by birth an American, of the United States, and as such is guilty of felony and piracy by the American law, and liable, if taken by any American force, to be tried and hanged.

The laws both of England and America, which make slave trading felony, carefully distinguish between two cases — first, that of slave traders committing the offence within the limits of the American or English jurisdiction, and of this parties are punishable to whatever country they belong; secondly, that of persons belonging by birth to America or England, and slave trading in any part of the world — these are, if taken, amenable to the criminal courts of their own country. An Englishman, ever so long settled in Brazil, or

even in Africa, where the traffic is allowed, which in Brazil it is not, is liable to be tried, if caught in England and in the English settlements, and transported for life — till 1837 he would have been hanged. So a citizen or a subject of the United States — any person born there, whatever now be his place of residence, is liable to be tried by the American law as a pirate, and hanged as such. Such has been the law of the United States ever since 1820; Chancellor Kent so lays it down in his celebrated “Commentaries on American Law,” p. 149.

Thus it is manifest that this man, were he bold enough to risk his person in his own native country, or were he caught by one of the United States’ cruisers, would infallibly be tried, and on his own confession received, and which could be proved by a host of witnesses, might be hanged. We give no opinion on the merits of the proposed mode of extinguishing the slave trade; we only ask, can Dr. Cliffe be called a credible witness?

II. — *The Moral, Social, and Professional Duties of Attornies and Solicitors.* By SAMUEL WARREN, Esq., F.R.S., of the Inner Temple, Barrister-at-Law. William Blackwood and Sons, Edinburgh and London; William Benning & Co., London. 1848.

WE anticipate much good from this volume, which is published at the request of the Law Society. The idea of lecturing the attornies and solicitors of the empire on their moral, social, and professional duties, was seasonable and happy. The execution (a task of great delicacy) is, on the whole, we think, truly admirable, though not faultless. The success will doubtless be commensurate; for the name of the learned author is always sure to inspire curiosity, and to beget attention. The main object of the present performance is to set attornies and solicitors right with the public; by showing, on the one hand, the incalculable importance of the functions they have to perform, and, on the other, the high standard of moral culture and intellectual qualification which an adequate discharge of those functions necessarily requires.

But Mr. Warren does much more than this; for by his vivid picture of their capabilities, opportunities, and responsibilities, he furnishes attorneys and solicitors with pure and lofty motives to action, so as to dignify and render interesting the most ordinary routine of their duties. The following passage is well calculated to open the eyes of the unthinking laity. After showing that the proper instruction of attorneys and solicitors is "a matter of vital concernment to society at large," the lecturer proceeds —

" You, gentlemen, are armed with powers really formidable, for good, and for evil. You may serve and protect, you may harass and oppress, all of us, in our turn; for which of us is there, how conscientious and circumspect soever, that may not, at some time or other, have to ask your services in the conduct of our affairs, and to assist us through unexpected litigation? Lord Chancellors and Judges, even, cannot discharge their exalted functions, without occasionally finding the law which they administer, turned, whether rightfully or wrongfully, against themselves! Bishops may have to run the gauntlet of a law-suit, before assuming their mitres! And — to pass for a moment from grave to gay — sweet Jenny Lind, warbling, lark-like, high in the regions of song, is suddenly stricken by a certain missile of ours, to wit, a writ, and drops terrified through the air, thrilling with her melody, into the arms of — *her attorney!* In the gravest exigencies of the state — equally in matters of business and of amusement, — on great and on small occasions, you find yourselves called into action, expected, and promising, *and that upon your oaths*, to acquit yourselves discreetly, and with integrity. Gentlemen, I repeat, speaking as one of the public, that we could not do without you, even if we wished. Whatever be our talents or acquirements; whatever our tempers and dispositions, — whether amiable and yielding, or exacting, irritable, and overbearing; whether we be virtuous or profligate, we may have to take you into our confidence, and open to you the most secret recesses of our hearts. We tell you what we would disclose to no one else on earth. We pour into your ears the accents of anguish all but unutterable. To your eyes are exposed hearts bleeding and quivering in every fibre; pierced by the serpent's tooth of ingratitude, broken by the loss of those whom we loved more than life itself, — whether taken from our arms by death, or ravished from us by fiendish lust, or the ruthless ruffian hand of violence. When our

domestic peace is slain ; when the most hallowed relations of life and society are dislocated by the evil passions of others — by cupidity, perfidy, fraud, hypocrisy, malice, and revenge ; in short, whether our honour, our life, our liberty, our property, or those of our families, are endangered or outraged, to you perforce we must fly in our extremity ; living or dying — yes, I say dying, for we descend into the grave, in reliance on the discretion and integrity with which you have undertaken to carry into effect our wishes on behalf of those loved ones whom we are leaving behind us ; whom we would fain shelter, as far as we may, from calamity and the world's reverses, by providing for them out of the produce of a life's labour, anxiety, and privation ; and we look to do all this, through the instrumentality of your judicious and conscientious exertions.

‘ When the shaft of calumny has wounded us, it is to you that we fly to vindicate our smarting honour. Into your ear are poured the affrighted accents of those to whom guilt is imputed ; crime, of fearful enormity, attaching infamy maddening to contemplate ; crime, too, which may be *falsely* imputed to him whom the mere imputation is blighting before your very eyes, and who in his agony and horror has sent for *you* — has summoned *you*, that he may listen, in the dread gloom of a prison cell, to your sympathising words of counsel and guidance ; that he may whisper into your ear the indignant protestations of an innocence which, with confiding eagerness, relies on you for its vindication. In all such agitating cases, I have been supposing you our friends ; but remember that we also have you for our *opponents*, using, then, your greatest energies as resolutely against us, as you would have used them for us, had you been called upon to do so. Oh, how much our peace and safety depend, in this latter case, on your being — *gentlemen* ! ’

The satirical pen of Fielding bore hard on the attornies of his day. He paints them as at once ridiculous and odious ; — fellows who talk jargon, and were constantly setting people together by the ears. Hence the modern solicitor rather eschews the designation of attorney. Mr. Warren, however, seems in love with it. He says : —

“ Let me take this opportunity of correcting an erroneous impression among some members of your branch of the profession, that the name of ‘ Solicitor ’ is their most honourable designation, — a title preferable to that of ‘ Attorney.’ It is certainly not so ;

and the late Lord Tenterden took the trouble several times of refuting such a notion, and stigmatising as absurd the conduct of those who called by the name of *Solicitors* persons conducting proceedings in courts of *law*. The proper expressions are 'Attorney at law,' and 'Solicitor in Equity.' There is no difference whatever between the two, in respect of rank, or *status*,—any more than there is between barristers practising respectively in courts of law and equity. If there be any preference I should have thought that it would lean towards the good old Saxon word *Attorney*—indicating an office most honourable and ancient. The word 'Solicitor' is, comparatively speaking, of much more recent introduction—an off-shoot from the under-clerks of the now abolished Six Clerks in the Court of Chancery. Which is higher in rank—her Majesty's 'Attorney' General or 'Solicitor' General? And yet, though all this be incontestably true, it is almost getting fashionable to drop the elder title, and adopt the modern new-fangled one—thereby causing it to be supposed, that the persons doing so, have no right to practise in the courts of law, but are confined to courts of equity! Believe me, gentlemen, the word 'attorney' is an honourable, a right honourable, old English word, and I hope it will not be lightly parted with by those who have a right to the title. When you have to address one another, therefore, let it be thus, as the case may be:— 'A. B., Esq., Attorney at Law,'—or 'A. B., Esq., Attorney and Solicitor'—but not 'A. B., Esq., Solicitor,' except possibly when you are corresponding with him solely on chancery matters, and you think it may please him to be so addressed! At all events, never use the word 'Solicitor' either in writing, or verbally, with reference to proceedings *at law*; or you will justly incur the censure expressed by Lord Tenterden."

Mr. Warren's directions to students are valuable, although we do not concur in all of them. We think seventeen, the year he prescribes for plunging a raw youth into the contamination of an attorney's office, too young. Nor can we assent to the occupation he recommends for the first twelve months—namely, the study "of the different kinds of writs, of process, and execution, the forms of jury process, particularly of verdicts and judgments—in short, all the formal entries and proceedings, direct and incidental, in the various stages of an action or suit in equity, notices, subpœnas, affidavits, warrants of attorney, and cognovits," &c. This is

reversing the natural order, which is to begin with principles and to conclude with details. The youth, we conceive, ought not to be articulated until he has finished a literary and philosophical education; until his tastes are formed, and his opinions, in some degree, matured. His character should be well fixed and strengthened before subjecting him suddenly to the influence of vulgar and corrupting examples inseparable from a great office, however strictly managed and carefully superintended. A lad of seventeen thrown into such a vortex is, unless vigilantly watched, on the high road to ruin. He may, indeed, become what is called "an expert man of business," but we apprehend he is not likely to figure in the world as one of the "peace-makers" commended by Mr. Warren in the following passage: —

"You will frequently see poor human nature in some of its worst aspects: it cannot but be so: and it will call forth the exercise of all the virtue, all the Christian feeling that is in you. To you will come panting revenge; merciless cupidity; hard-hearted avarice; *hatred, malice, and all uncharitableness*. Into your ear will be poured, from time to time, their fierce whisperings against their unfortunate fellow-creatures. To gain their ends, to wound the feelings of an opponent, and secure often some petty advantage, persons employing you will not scruple to violate the sacred confidence of social intercourse; and it will be sought to make you a sure, a willing and sharp instrument, in their unholy hands, to gratify their evil passions; to oppress and crush the unhappy and helpless; to pursue, for instance, the hasty utterer of slander — the unthinking wrong-doer — with deadly pertinacity, and consequent cruelty to both parties; when a timely, kind, judicious interposition would have healed the skin-deep wound, and restored peace and amity. *Will you do these things, my friends? Will you consent thus to demean yourselves, and degrade your office? Nay, but God forbid! You shall, on the contrary, throughout life, remember from whose awful lips fell the words 'Blessed are the peace-makers!'* You shall say on such occasions, with noble firmness, 'I will not do what you demand. I disdain to be the instrument of your vindictiveness, of your over-reaching avarice; I will not be the conduit-pipe of your sweltering venom and malignity. I will not, at your bidding, plunge your debtor into prison, and his family into the poor-house. I will not hurry into the Gazette one struggling manfully but desperately



with misfortune, and whom you would prostrate with short-sighted fury. I will not do all this when I am satisfied that they are unfortunate only, and you cruel and exacting. If you want to crush and to destroy, go elsewhere! I will not abuse the law; I will not plunge its sharp weapons into their hearts, nor prostitute law, in my person, by giving effect to your unjust and tyrannical wishes!" (Pp. 39—41.)

But the powers of Mr. Warren are most signally exhibited when, having dismissed the articulated clerk, he comes to deal with bearded attornies and solicitors; the most hoary and sage of whom will do well to read, mark, learn, and inwardly digest what he says as to the irreparable evils occasioned, we trust not often, by their negligence or their blunders.

"Take the case," he says, "of your being sent for in haste to prepare the will of some one suddenly seized with mortal illness, or who has suffered some dreadful accident, hurrying him to a premature death-bed. It may be a person of great wealth, whose property, both real and personal, is in a complicated condition, — whose business transactions are extensive and intricate, — who has a large family to provide for. He is suddenly bidden by the Supreme Disposer of events, to *turn his pale face to the wall*. Haste! Haste! Life is ebbing fast away: his family are weeping around him; but he is waiting for — is thinking of — *you*, in his agony and alarm: he has but an hour or two — it may be less time — to live: he has, with fatal imprudence, delayed making his will till this terrible moment, and *you* are now suddenly summoned as the nearest professional man accessible. Writing materials are at hand: the medical man has ominously whispered that you have not a moment to lose: and he leaves you for awhile with his dying patient. As you look on him, — as you listen to him — are you flustered and bewildered? Does your ill-regulated, turbid mind, fail to follow your unhappy client, so that you do not distinctly perceive his intentions and wishes — intelligible though they really are — for the disposition of his property; do you feel a sickening consciousness that you cannot carry them into effect; or do you, perhaps, imagine that you *can* when you really cannot? You draw up, however, a document professing to secure the interests of many tenderly-beloved children, and other dear afflicted beings dependent upon the testator, and their very sobbings may be audible to you. Having caused that instrument to be executed, you quit the apartment, assuring your client almost at the last gasp, that as far as

regards his worldly affairs he may die in peace; and you depart with his feeble thanks in your ears, the pressure of his feeble fingers on yours; — and yet, the instant that the will comes into operation, it explodes, as it were, like a shell! — shattering every interest which it touches! It plunges everybody and everything into inextricable confusion; involves those whom your poor client best loved, in ruinous and sometimes malignant and interminable litigation; your blunder is proclaimed, canvassed, and vainly sought to be rectified, in court after court in law and equity; you are unable to bear the agonising but unavailing reproaches of those on whom your ignorance or incapacity has entailed such lamentable evils. You dare not go near the grave of him whom you have so dreadfully deceived and wronged!" (Pp. 159, 160.)

This is a case of sheer incapacity, in which it may be said that the contract between a professional man and the public, whereby he engages for competent qualification, is violated; and yet, strange to say, for the deep wrong he here inflicts he is subject to no other penalty than the reproaches of his own conscience, if he have one; and it may well be doubted whether *such* a man is likely to be much discomposed by so embarrassing a commodity. No action for damages can be sustained against him at the suit of those "dear ones," the victims of his fatal blundering; for the only evidence of the testator's intentions would prove too much; it would prove that those intentions, however clear, had failed of execution — a curious result, and not easily reconcileable with reason or justice, since the very fact of the transgression forms the delinquent's shield against punishment.

But in other cases damages are recoverable from an attorney or solicitor for the consequences of his error or negligence. The Courts have leant on cases of this sort with a heavy hand. Mr. Warren, therefore enforces, by many precepts and examples, the cardinal duty of *accuracy* in all things, small as well as great; — accuracy which is at once the *only*, and the *all-sufficient*, guard against the unnumbered perils which surround the life of the well-employed man of business. The rocks and sands which lie concealed in the wide sea of the reports are here charted and marked out for his guidance and preservation. This is one of the most useful things in

the book; and the preparing of it must have been a work of labour as well as skill. Those who have had practice in legal writing know, better perhaps than any, that the traces of excogitation are least apparent in what is best done, and what has cost most labour, as in clearing away a mound we destroy the evidence which would have shown the difficulty and the extent of the operation.

We are also desirous of extracting Mr. Warren's remarks as to a very common, but a very absurd, error respecting *literary* lawyers:—

“Why do I speak in this tone? To implore you not to depress yourselves into drudges—not to libel both law and letters, by saying that they cannot live together—that they are incompatible pursuits. It is not true, gentlemen; for I know many living contradictions to such an assertion, in eminent members of your branch of the profession; and to my certain personal knowledge, most, if not all, the profoundest lawyers living, beginning with Lord Lyndhurst and going down to the latest accession to the judicial bench, are also distinguished by their general scholarship—scholarship ripe and sound, literature varied and elegant, and the highest philosophical acquirements. My late gifted friend, and the most distinguished of your lecturers, Mr. John William Smith, at the same time that he was a most learned, able, industrious and successful lawyer, was a man of wonderful classical and general acquirements and accomplishments—as was known to all of us his surviving friends. Away, therefore, with so illiberal and vulgar a calumny, as that the man of law cannot also be a man of letters. You—we—are all estopped from making such an allegation, by the examples which I have cited, and which I could greatly multiply. 'Tis a calumny spread about by plodding dullards and envious sneering incapables, and which, were it to obtain general credence, would attract public contempt towards the whole of our profession. I, for one, will not remain silent under such an imputation; and I ask you to look at the ranks of my brethren, numbering nearly four thousand. Were you to be thoroughly acquainted with them, you would assuredly find that many of the most learned lawyers are also most accomplished scholars; and do they discharge their duties the worse for that? You know better; and that I could readily mention names which would offer the assertion a splendid refutation. But, to descend to far lower ground, your own interests, even—your direct pro-

professional interests — are likely to suffer materially, if you give into, and act upon, this injurious, degrading, and most fallacious notion. As I endeavoured to show you on a former occasion, you must keep pace with an advancing age — the age which you seek to represent, in advising and upholding the interests of its individual members; interests often consonant with, dependent upon, and consisting of literature and science; matters occasioning litigation, and that, too, the most interesting, arduous, and lucrative. Imagine a scholar, a philosopher, coming to put his important professional interests into the hand of a driveller who cannot understand a word he says; — cannot enter into his feelings and anxieties; nor appreciate the nature of the interests affected, or the injury which he has sustained, and is consequently unable properly to instruct those who are to advocate and protect such interests in court." (Pp. 224—227.)

In speaking of the hazard of entering into written undertakings on behalf of clients, Mr. Warren refers to a recent decision, from which it appears that an attorney or solicitor's obligation will be made good, although subject to objections which would render the document worthless if attempted to be enforced against any other than an officer of the Court. Most people will think this a very salutary rule of discipline.

"As an additional incentive to caution against committing yourselves in writing, let me remind you that you are amenable, as officers of the court, to their summary jurisdiction, and they will enforce undertakings entered into by you in your characters of attorneys and solicitors, without reference to technical objections to the legal validity of such instruments. Take, for instance, the recent case of *Ex parte Hilliard*, 2 Dow. & Lowndes, 919. There the defendant's attorney entered into the following undertaking: 'I agree to pay Mr. Samuel Smith, within one calendar month from this day, the sum of 29*l*. Witness my hand, this 30th of October, 1844. J. H. Hilliard.' You will instantly see<sup>1</sup> that this

<sup>1</sup> 21 Car. 2. c. 3. s. 4. Mr. Warren here attributes great acuteness to his audience. There seems nothing in the words of the fourth section of the Statute of Frauds to prevent the above agreement from binding, although certain adjudications have indeed said the contrary. Lord Ellenborough, in *Wain v. Warlters*, 5 East, 10., held that the *consideration*, as well as the promise, must

undertaking was void in point of law, through non-compliance with the Statute of Frauds. Nevertheless the court enforced performance of the agreement by him, their own officer, who had made it, and enforced it most justly."<sup>1</sup> (P. 307.)

The directions to attornies and solicitors how to keep their clients' monies at their bankers, are useful, without pretending to originality. The precepts are backed by authority, and rendered interesting by example. This, indeed, is the character of the work throughout, and what imparts to it its value.

"Beware how you mingle your clients' money with your own, at your bankers; for if those bankers should fail, you will have to make good the loss to your clients. Of this the case of *Robinson v. Ward, Ryan & Moody*, 271., is a miserable example: for there the attorney, a gentleman of the highest respectability and honour, had to make good to his client no less a sum than 5300*l.*! Lord Tenterden lamented the hardship of the case, but applied the rule of law firmly. That misfortune arose out of Fauntleroy's forgeries. The sum in question being the produce of the sale of an estate belonging to the defendant's client, was deemed by the former too large a sum to be kept in his own house. He therefore paid the whole in the identical notes which he had received from the purchaser of the estate into the bank of Marsh and Company, in which Fauntleroy was a partner; but he paid it in, together with 11*l.* 9*s.* 11*d.* of his own, to *his own private account*. Three weeks afterwards the bank stopped with 1600*l.* of the attorney's own money, beyond his client's 5300*l.*; and the unfortunate attorney, 'upon whose conduct,' said Lord Tenterden, 'not the slightest suspicion could rest,' had to make good to his client the whole sum of 5300*l.* You ought to have two distinct accounts with your banker; one your own private account, the other you might style your 'professional account,' or 'trust account;' specifying always the name of the client whose money you pay in;

appear in the writing; and his ruling has been followed in the common law courts. But we do not recollect any case decided upon that reasoning in equity, and in *Hammersley v. De Biel*, 12 *Cl. & Fin.* 61. *n.*, it would rather appear that Lord Cottenham gave it the *go bye*.

<sup>1</sup> See also the later cases of *In re Fairthorne*, 3 *D. & L.* 548., and *Titterton v. Shepherd*, *ibid.* 775., as instances of the extent to which the Courts go on these occasions.

but, at all events, in some way or other, keep your own and your client's money perfectly distinct and separate from each other." (P. 361.)

Mr. Warren deserves very high praise for what he has said about the duty cast on attornies and solicitors of deciding the question of a testator's competency to make a will. On this difficult subject we think the following suggestions no less useful than prudent : —

" I doubt whether, in the whole range of your duties there be one, the discharge of which is attended with greater anxiety and responsibility, than that which is often cast upon you, — of determining on *the mental competency of a testator* to make a will. Pray bear in mind, when called to this exercise of your discretion, the ordeal through which you may afterwards have to pass, — the severe scrutiny to which your decision may be subjected in a court of justice. Let this reflection serve as an incentive to circumspection. Only consider what caution is requisite ! Suppose, for instance, you should, in your conscience, believe your client incapable of making a will, while he, and those about him, think otherwise : what will you do ? Suppose you should refuse to be concerned and death intervene, followed by intestacy ; even the medical attendant concurring with the relatives and attendants, in thinking that the testator was capable of making a will ? — Well, gentlemen, even in an extreme case like this, I conceive it to be your duty to act firmly in conformity with the dictates of your own conscience, and refuse to carry into effect what you believe to be only spurious wishes and intentions. If you should unfortunately have erred in your judgment, it will be an honest error, provided you really exerted your faculties to the utmost, in coming to your conclusion. You may be consoled by reflecting that the intestate's own negligence and procrastination conduced to the disappointment of his wishes, and the wishes and hopes of those whom he meant to benefit ; and also devolved on you an unfair amount of responsibility, in determining, comparatively without assistance, so momentous a question as that of his capacity, or incapacity, to dispose of his property. He has yet cause to be thankful that *the law* is at hand to supply his omission ! In a case of this description, you should be guided, to a great extent, by the opinion of the medical attendant, especially if he be a person of established character for ability, experience, and honour. Your own strongest impressions might well give way before his,

on the maxim, *cuique sua arte credendum*. Your diffidence should be great, in proportion to his confidence, in a matter so peculiarly within his province—so frequently the subject of his observation and experience. It is possible that a conscientious practitioner might, under such circumstances, be unwilling to incur the vast responsibility of refusing to carry into effect the wishes of his client and his family; and might, as it were, under protest, prepare the will, expressly warning those concerned, that if it should be questioned, he would declare his opinions openly in court, leaving a jury to decide whether the will was, under the circumstances, valid, or not. This, however, is obviously a suggestion requiring the greatest caution in acting upon it, as well to prevent cowardly mental compromises on the part of honourable but timid practitioners, as to avoid affording a pretext and opportunity for innumerable and disastrous frauds, to the unscrupulous. It is difficult, if not impossible, to lay down a general rule on the subject, for each case must depend on its own circumstances. The responsibility, after all, rests with yourselves, of surrendering your conscientious judgment, or adhering to it with unjustifiable pertinacity. In such cases, I think I should be guided not a little by the nature of the will which it was proposed to make. If its provisions appeared reasonable, just, and suitable to the position of the testator and his family, — in duly consulting the interests, for instance, of his wife, children, and near relations, or old and valued friends, — that of itself would afford most cogent evidence that the testator possessed a true disposing mind. If, on the other hand, he proposed to make an unjust, a cruel, or capricious disposition of his property, — disinheriting a child or children, making no provision, or a grossly inadequate one, for a deserving wife, — or alienating his property for absurd, unworthy, or disreputable purposes; — I should be strongly disposed to let that circumstance turn the scale, and should refuse to be any party to framing an instrument which would act so unjustly, unreasonably, or tyrannically. Nay, I question whether I would give any assistance to a testator, however mentally sound, if so morally unsound; gravely pausing, at all events, before I gave irrevocable operation to death-bed caprices, prejudices, and antipathies. I knew a gentleman, a London attorney of eminence, and very high honour, who acted thus, on a particular occasion, and refused to make a will, by which a client intended to disinherit his son. The testator lived to think better of it; expressed great thankfulness to the gentleman in question, for his firmness and high principle; and ulti-

mately made a will in conformity with the dictates of nature and religion.—To return, however, to your client's chamber. In cases of doubt, such as that above supposed, remembering the public scrutiny to which the transaction, and particularly your share in it, will be exposed, secure good evidence of the true state of things, by having some disinterested witness present,—the medical man, the clergyman, if within call,—some respectable neighbour or friend of the dying person,—some one, in short, whose name will not appear in the will, otherwise, possibly, than as witnesses. Above all, use your utmost exertions to secure *efficient attesting witnesses*—persons of character, intelligence, and firmness,—such as are not likely to be shaken by the most violent cross-examination to which they may be exposed by counsel engaged on behalf of persons deeply interested in nullifying their testimony;—and of such respectability and probity as will bid defiance to all attempts to tamper with them.” (Ps. 376—382.)

In taking leave of Mr. Warren, we cannot abstain from saying, that the cause of “Law Lectures” has received a lift from the success of his experiment. They have been tried, and found to answer well in the case of articled clerks. But Mr. Warren doubts whether lectures could give any help to “students for the bar.” This, we take leave to say, looks very like a freak of the understanding. If attornies and solicitors, men of practice, gain by lectures, much more certainly will the same object be obtained when the recipients of instruction have wider views and higher aims. The objection usually taken to lectures is, that they cannot of themselves make men of business. Hence it is that “students for the bar,” immediately on quitting the university, are put to copying precedents with conveyancers, pleaders, or equity draftsmen. No reasonable being desires to alter this ancient and well-approved system. But the question is, whether lectures ought not to be superadded? The great body for whose benefit the present work has been prepared, and who owe a debt to the author, have answered this question by their own triumphant experience. Those sagacious individuals, who are wiser in their generation than the children of light, saw, upwards of twenty years ago, the necessity which had come for setting their house in order.



With the sanction of the Judges and Parliament, indeed, but without collateral aid or endowment of any kind, they have, entirely out of their own funds, erected a great and prosperous institution, for the better government of their society, and the more liberal culture of its junior members. The good which this establishment has already effected, in the way of superintendence and controul, is probably but little, when compared with that which may be expected hereafter to flow from it. We do not say that the Inns of Court have been inattentive spectators of these proceedings on the part of the attornies and solicitors; but we pray them to remember, that to whom much is given, from them also something is expected; and that it is not enough for men who hold large possessions upon the express trust of legal education<sup>1</sup>, to follow tardily, not to say reluctantly, in the wake of those to whom nothing was given, but who have themselves given everything.

III.—*The Text-Book of the Constitution. Magna Charta, the Petition of Right, and the Bill of Rights. With Historical Comments, and Remarks on the present Political Emergencies.* By E. S. CREASY, M. A., Barrister-at-Law; Professor of History in University College, London; late Fellow of King's College, Cambridge. London: Richard Bentley. 1848.

It is well in these days to have placed before us the landmarks of our constitutional rights. So much practical liberty of thought, word, and action is enjoyed in England (we pay rather dear for it, it must be confessed), that we are apt to forget how and when we acquired it. Professor Creasy, then, has done well to furnish us with this well-timed little treatise to remind us of these matters. It is a thoughtful, learned, and eloquent production, which, familiar as we suppose ourselves with its subject matter, may be read with great instruction by all; and we are not surprised to learn that it has already attracted the attention of foreign jurists,

<sup>1</sup> This was shown by documentary authority in a former number of this Review.

and that it is to be translated for the benefit of the reformers of French and Germany, — and may they profit by it.

In the first part of the treatise the three great statutes — Magna Charta, Petition of Right, and the Bill of Rights — are placed before the reader with historical and legal comments, so as to enable him to trace in them the great principles of our constitution, to discern their antiquity and development, and to appreciate their enduring value.

With this view portions of other important constitutional enactments, such as the *Confirmatio Chartarum*, the *Articuli super Cartas*, the act abolishing the Star Chamber, and the Habeas Corpus Acts, are quoted and explained. And copious extracts and careful condensations from many of the most valuable writings of Hallam, Palgrave, Guizot, and Mackintosh, are given, so as to enable the reader to reap ample benefit from the learned and laborious researches of these great inquirers into the archæology as well as the more recent history of England.

One great object is to prove that the great primary principles of our constitution are all to be found in the Great Charter of John, and that the date of the grant of this charter is the epoch at which our English nationality began to exist. The learned Professor first deals with those who deny the existence of the English constitution; and, though disclaiming some of Burke's arguments in support of it, he maintains that —

“ An impartial and honest investigator may still remain convinced that England has a Constitution, and that there is ample cause why she should cherish it. And by this it is meant, that he will recognise and admire, in the history, the laws, and the institutions of England, certain great leading principles, and fundamental political rules, which have existed from the earliest periods of our nationality down to the present time; expanding and adapting themselves to the progress of society and civilisation, advancing and varying in development, but still essentially the same in substance and in spirit.

“ These great primeval and enduring principles are the principles of the English Constitution. And we are not obliged to learn them from conflicting speculations or suppositions; for they are imperishably recorded in the Great Charter, and in the charters

and statutes connected with and confirmatory of Magna Charta, with which the volume of the laws of the land auspiciously commences. In Magna Charta itself, that is to say, in a solemn instrument deliberately agreed on by the king, the prelates, the great barons, the gentry, the burghers, the yeomanry, and all the freemen of the realm, at an epoch which we have a right to consider the commencement of our nationality, we can trace all these great principles, some in the germ, some more fully revealed. In the statute entitled *Confirmatio Chartarum*, which is to be read as a supplement to its great original, we discern these principles manifested with additional clearness. And thus, at the very dawn of the history of the *present* English nation, we behold the foundations of our great political institutions imperishably laid, and their essential forms proclaimed.

“These great primeval and enduring principles of our Constitution are as follows :—

“The government of the country by an hereditary sovereign, ruling with limited powers, and bound to summon and consult a parliament of hereditary Peers, and of elective representatives of the Commons.

“That the subject’s money shall not be taken by the sovereign, unless with the subject’s consent, expressed by his representatives in Parliament.

“That no man be arbitrarily fined or imprisoned, or in any way punished, except after a lawful trial.

“Trial by jury.

“That justice shall not be sold or delayed.

“These great constitutional principles can all be proved, either by express terms, or by fair implication, from Magna Charta, and its above-mentioned supplement.

“Their vigorous development was aided and attested in many subsequent statutes, especially in the Petition of Right and the Bill of Rights; in each of which the English nation, at a solemn crisis, solemnly declared its rights, and solemnly acknowledged its obligations :—two enactments which deserve to be cited, not as ordinary laws, but as constitutional compacts, and to be classed as such with the Great Charter, of which they are the confirmers and the exponents.” (Pp. 2, 3.)

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“A remark has been made in the preceding page respecting the epoch of the Great Charter, the correctness of which every reader may not admit as self-evident, but which is of vital importance in

estimating the full nature and value of that great corner-stone of our Constitution. It has been said that *Magna Charta* is coeval with the commencement of our true nationality ; in other words, that we have had our present constitution, as represented in *Magna Charta*, throughout the whole period of our true national history. This is best explained at the outset, though at the risk of enunciating what to some may be historical truisms.

“ Our English nation is the combined product of several great elements of population. Of these there have been four principal ones — the Saxon, the British (*i. e.* the Romanised Celtic), the Danish, and the Norman. The Saxon is mentioned first, as being undoubtedly the most important, and as constituting the chief fountain with which the other sources have mingled, forming at last in their complete junction the English people such as it has since been, and such as it now is. But each of the four elements has largely modified the rest, and each has exercised important influence in determining our national character and our national career. To take the last of them in point of date — by the influx into this island of the victorious Normans (that is to say, of Scandinavians by origin, who had for 150 preceding years been settled in France), the former government in this island was overthrown; new divisions of rank and class were introduced; new tribunals and new laws regulated property and person; almost the whole of England was parcelled out to new men to hold on new terms, and a martial nobility of the bravest and most energetic race that ever existed, was far and wide planted as a dominant class in the land.

“ Moreover, although the coming over of the Normans made up the last great element of our population, many years elapsed before it coalesced with the rest. For upwards of a century after the Conquest, Anglo-Norman and Anglo-Saxon kept aloof from each other; the one in haughty scorn, the other in sullen abhorrence. They were two peoples, though living in the same land. It is not until the thirteenth century, the period of the reigns of John and his son and grandson, that we can perceive the existence of any feeling of common nationality among them. But in studying the history of these reigns, we read of the old dissensions no longer. The Saxon no more appears in civil war against the Norman; the Norman no longer scorns the language of the Saxon, or refuses to bear together with him the name of Englishman. No part of the community think themselves foreigners to another part. They feel that they are all one people, and they have learned to unite their efforts for the common purpose of protecting the rights

and promoting the welfare of all. The fortunate loss of the duchy of Normandy in John's reign greatly promoted these new feelings. Thenceforth our barons' only homes were in England. One language had, in the reign of Henry III., become the language of the land, and that, also, had then assumed the form in which we still possess it. One law, in the eye of which all freemen are equal without distinction of race, was modelled, and steadily enforced, and still continues to form the groundwork of our judicial system.

"With this period our true nationality commences; for our history from this time forth is the history of a national life, then complete and still in being. All before this period is a mere history of elements, and of the processes of their fusion. The first great event of this period, the first effort of this awakened English spirit, was the obtaining of *Magna Charta* *by* all and *for* all the freemen of the land. The constitutional principles promulgated therein were at once the first fruits and the guarantees of our nationality; and we are enabled to appeal to them as embodying the terms of an original contract between King and People in literal truth, and not in the unreal and fallacious sense in which that expression has frequently been misused." (Pp. 3—6.)

The "primary principles of the Constitution," which are enumerated by the author in the first part of the above extract, are expounded by him singly, and the recognition of each of them in the great charter is demonstrated. In pointing out their gradual development, the author gives, in fact, an epitomised constitutional history of England. It is also no slight advantage, that the original Great Charter of John is in these pages translated and given in full length. As is well known, the *Magna Charta* with which our ordinary editions of the statutes commences, is not the Great Charter of John, but a copy of that confirmed by Henry the Third, in the twenty-fifth year of his reign, with numerous important modifications of and omissions from the original charter of the liberties of England, which was obtained at Runnymede.

In the latter part of the work before us, the constitutional history of England is brought on from the reign of William III. to the present period; and discussions on political topics follow, which it is out of the sphere of this Review to deal with. We can, however, without entangling ourselves with party matters, draw attention to a passage in which

Professor Creasy points out a fact which is of deep importance, not only to the student, but to the statesman, to bear in mind, and which, though when once adverted to, it seems self-evident, has, we believe, been almost universally neglected by those who quote the old-fashioned authorities on constitutional questions. We mean the extent and rapidity of the change in the political feelings and general character of the lower orders, compared with what they were half a century ago, and when Montesquieu, Blackstone, De Lolme, and other standard writers discussed the merits and the prospects of the British Constitution.

Professor Creasy says —

“ It is from the masses, from the millions of artisans and labourers, that the new formidable movements originate which compel attention ; and the present position, duties, and *rights* of the masses in respect to the English Constitution are things which it is neither morally just nor politically expedient to neglect.

“ This practical inquiry is closely connected with the investigations which have occupied the preceding portions of this work. We have traced the origin of the English Constitution, and the first development of its principles, at a time when the newly-formed English nation consisted of not more than two or three millions of human beings ; one half at least of whom were in an abject state of serfdom, while the other half, the freemen of the land, the ‘ *Liberi homines* ’ of Magna Charta, were divided into proud and powerful barons, each girt with his band of armed retainers and personal dependents ; into smaller landowners equal in birth but inferior in possession to the great peers ; into a class of still smaller owners of land, our free yeomanry,

“ ‘ England’s peculiar and appropriate sons,

“ ‘ Known in no other land,’ —

and into citizens and burgesses who were beginning to revive the old Roman system of municipal self-government, and to re-awaken the spirit of commercial energy and enterprise. First framed in those troubled times, and for that scanty and ill-assorted population, our constitution has expanded with the expanse of civilisation, numbers, and power ; and while it has preserved all its integral parts and all its primary attributes, it has become the government of and for us, the middle classes of the sixteen millions of this mighty English nation, whose language, laws, arts, arms, and

institutions are over-spreading every region of the world. But its gravest trial yet remains, and seems likely to be brought to a speedy issue. Can our constitution adapt itself to the growing claims of the lower orders, as it has to the growing claims of the middle orders; or, must it be either guarded by force against their assaults, or surrendered to them as not worth being preserved at such a price? — In other words, what is the new democracy? Are its existence and growth necessarily incompatible with the maintenance of our constitution? And, if so, is the new democracy to be coerced, or the constitution to be abandoned? These are questions which it is impossible long to shirk, and it is better to discuss them with pens than with pikes.

“Great as is the contrast between the position and importance of the middle classes at this time, compared with their situation a century ago, we see changes still more momentous when we compare the lower orders of the present day with the lower classes of the former epoch. The political *status* of the middle classes has been improved, but the political *status* of the lower orders has been created; and their might, like that of the Aloidæ, while yet in its infancy, fills the higher powers with consternation. No one, during the constitutional struggles which the great Barons headed, thought about the politics of the villeins of the country. No one of the gentry, the yeomanry, and the tradesmen who strove against the Stewarts, ever claimed political power for the labourers and common artificers of the time. Nothing, indeed, can exceed the scorn with which Milton, and other writers of that period ‘*Pro populo Anglicano*,’ speak of the mere ‘*Plebs*.’ To come down to times nearer to our own — to the first years of the reign of George III. — eighty years ago, though political controversy was hot enough, and though the territorial aristocracy was rapidly giving way to the new men from the central files, no one ever heard or dreamed of the lower orders meddling with politics. No statesman thought that ploughmen and journeymen mechanics even knew what the parliamentary franchise meant, much less that they wished for it, and least of all that they had any possible right to it.

“But things are wholly altered since then; and we live in a very different age to that in which Blackstone could complacently remark to his well-bred audience at Oxford, that inquiries into the foundation of rights ‘would be useless, and even troublesome, in common life,’ and that ‘it was well that the mass of mankind should obey the laws, when made, without scrutinising too mi-

nutely the reasons for making them.' Such apathetic submission to the ordinances of their supposed betters no longer exists, and never can exist again, among our lower orders. There were no Chartists or Trades' Unions when Blackstone wrote. There could not be such bodies, for society then contained not their materials. The rudiments of education were rarely to be found among the inferior artisans of our large towns, and were almost wholly unknown among the peasantry. There must have been then, as now, much poverty, much suffering, much repining at their own lot, much envy of the more affluent and powerful; but the idea of mutual combination and joint efforts to obtain the right of voting and the power of altering the system of government, was never heard of among them. The huge growth of the populations of our manufacturing towns, the general increase in the numbers of the whole people, the progress of education (lamentably imperfect as it has been, especially for the best objects of education), the springing up of a cheap press and a cheap literature, the universal ferment caused in men's minds by the American War of Independence, and by the uprisings of the fierce democracy of France—these and other well-known causes have made the lower orders of Englishmen what we now behold them. The habit of combination which they have acquired, of itself proves the greatness of the change. This new tendency of our masses to act in organised bodies, has been fully proved by the thousands who joined in the political unions, which preceded, and in the trades' unions, which followed, the passing of the Reform Bill. The hundreds of thousands who are now enrolled as Chartists confirm it. And we see indeed this formidable method followed up for any purpose which interests any considerable number of operatives in any of our large towns. This habit of combining, of planning, of debating, of organising, and conducting the diplomatic and fiscal machinery, which every association, however small, requires, is at once the result and the instrument of political education. The masses that have acquired it are sure to be politically active, whether their activity be for good or for evil." (Pp. 58—60.)

The history of our Constitution, in fact, requires to be re-written; and the present work of Mr. Creasy, if not the new history itself, furnishes materials for writing it.



- IV.—1. *A Paper, by Mr. Pulling, on the Propriety of reviving the Action of Account for the Purpose of facilitating the Investigation of Accounts in Courts of Common Law, particularly in the Cases of Partners and Agents.* 1848.
2. *A Practical Compendium of the Law and Usage of Mercantile Accounts, describing the various Rules of Law affecting them, the ordinary Mode in which they are entered in Account Books, and the various Forms of proceeding and Rules of Pleading, and Evidence for the Investigation at Common Law, in Equity, Bankruptcy, and Insolvency, or Arbitration, by ALEXANDER PULLING, Esq., of the Inner Temple, Barrister-at-Law.* Butterworth, 1846.

THE most difficult subject of the day is that of procedure. We are now all pretty well agreed in the desire for simplicity and cheapness in this respect, and we are beginning to find out that this is quite consistent with what are called "the interests of the profession." But alas! between the desire to have and the possession in this respect, how great the difference! Mr. Pulling is a very laudable procedurist, or searcher after right procedure; and, speaking of one great branch of business, he says, very truly, "that in a large proportion of cases, which in this great commercial country are made the subject of litigation, the real matter in dispute consists rather in details, which can be more conveniently investigated in the chambers of qualified officers and accountants, than in open court." In the face of such an obvious truism, it is difficult to account for the fact, that except through the medium of a suit in Chance, or the machinery of the Bankruptcy Court, there is no mode of investigating such matters of detail recognised by the law of England. The daily dealings and transactions of men in every department of life create unsettled accounts between them, and yet our law provides no mode in which the equitable and satisfactory adjustment of such accounts can be insisted on. We find in Mr. Pulling's useful work on Mercantile Accounts, which, but for the press of other matters, we should long ago have noticed, the various

forms of proceeding for the investigation of disputed accounts in the tribunals of this country, treated of at length, with the rules of law and of evidence applicable to each distinct class of accounts which the relation of debtor and creditor, principal and agent, principal and surety, &c., or bankruptcy or insolvency, give rise. In this summary of the existing law relative to the compulsory adjustment of accounts, it is easy to say in how large a number of cases our system, whilst it nicely adjusts the respective *items* in every class of accounts, practically screens from legal process the defaulter who refuses to come to any account at all.

It is next to impossible for an account of any length or intricacy to be investigated in *open court* by judge or jury; and hence, in a court of common law there is in many cases really no mode of compulsorily adjusting a disputed account. If in an action of debt or *assumpsit*, involving details of any intricacy, the parties cannot be induced to consent to an arbitration, it is a hundred to one that the defendant escapes with impunity, by the trial being put off, the Judge absolutely refusing to try it (as Lord Ellenborough did in *Scott v. Mackintosh*, 2 Campb. 239.), or the Jury, worn out and impatient at the tiresome ordeal, giving a verdict wholly irreconcilable with justice.

It may be said that in such a case the Court of Chancery, at all events, affords adequate relief; but the machinery of that Court, whatever efficacy it may have in keeping trustees and guardians within strict bounds, is little calculated for adjusting the multifarious disputes of mercantile life. A suit in Chancery against a salesman, to get the accounts of his months' sales; or between two brokers, to adjust the accounts of an isolated *joint transaction*, would be a mere mockery of justice. We are now labouring to improve the machinery of the Master's office with this view.

The French code recognises a peculiar mode of proceeding in questions of account<sup>1</sup>, as our own common law does in the case of the "action of account," which appears to have been available in almost every case where a suit in equity for an

<sup>1</sup> Code de Procedure Civ., liv. 5. tit. 4. p. 528.

account is now necessary<sup>1</sup>, and even in many cases where the ordinary remedies are not.<sup>2</sup>

From the paper already referred to we learn that, "In some of the states of America our old form of the action of account appears to have been successfully revived for the purpose of adjusting mercantile disputes, both those between partners and between principal and agent<sup>3</sup>; and in *Pennsylvania* the mode of proceeding in this action has been very recently subjected to legislative amendments, so as to render it available in most cases respecting accounts, where, in this country, recourse is had to a suit in Chancery. <sup>4</sup>

"There are not wanting instances in modern times where, in this country, the revival of the action of account has been hailed with satisfaction from the Bench, as by Chief Justice Wilmot, in *Godfrey v. Saunders*<sup>5</sup>, and in *Scott v. Mackintosh*; Lord Ellenborough observed, 'Those who wisely framed our jurisdictions did not contemplate a long account between merchants being referred to a jury. This tribunal is quite unfit for such an investigation, and we have not the necessary time to bestow upon it. Let the plaintiff bring his action of account, and auditors will be appointed who will do justice between the parties, without producing any inconvenience to the public.'"<sup>6</sup>

In the later case of *Baster v. Hosier*, the adoption of this proceeding was made conducive to the ends of justice by the defendant consenting to a reference of the matter in dispute (under 150*l.*), which he had previously refused to accede to, on the supposition that the only remedy for the plaintiff was a suit in Chancery. On a recent occasion<sup>7</sup>, however, where this proceeding by action of account was adopted, Lord Denman observed that "he could not say that in the present

<sup>1</sup> See Pulling's Law of Accounts, p. 115.

<sup>2</sup> Ibid. p. 118.

<sup>3</sup> See *James v. Browne*, 1 Dallas' American Reports, 339. *Jordan v. Wilkins*, 2 Washington Circuit Reports, 482.

<sup>4</sup> Act of the Legislature of Pennsylvania, 13th October, 1840, cited in the edition of Starkie on Evidence, by Gerhard and Metcalf, vol. ii. p. 17.

<sup>5</sup> 3 Wilson, 47.

<sup>6</sup> 2 Campb. 239.

<sup>7</sup> *Tucker v. Dodson*, Guildhall, 14th December, 1847.

state of the law he wished to see that form of action repeated—it was a cumbrous proceeding, and led to no satisfactory result. Whether or not the proceeding could be amended, he was not at present prepared to say."

The preliminary proceedings in an action of account are by no means more cumbrous than those in ordinary actions at common law. Up to the judgment on the original issue, as to the liability to account, whether on a trial and verdict or a judgment by default, the proceedings, in fact, are every way similar. The real source of delay is in the proceedings for the actual investigation of the account, when, instead of the whole account being submitted together to the *auditors*, the *cumbrous* proceeding alluded to by Lord Denman is adopted of formal pleadings with respect to each separate item, somewhat after the fashion of the states of facts, charge and discharge, in Chancery proceedings. It really appears to us that a few useful rules, altering this tedious system, and substituting a *vivâ voce* investigation before the auditors, would remove the objections at first raised against this wholesome mode of proceeding, prescribed by the common law of England, for the adjustment of disputed accounts.

As suggested in the paper before us, the only alterations necessary to bring the action of account into present practical use appear to be the promulgation of similar rules for establishing simplicity of pleading and simplicity of proceedings in this as in other personal actions, and the abolition altogether of the system of written pleadings in proceedings before the auditors. The judgment *quod computet* would then be tantamount to an ordinary judgment in assumpsit, by default for want of a plea, with the advantage of more complete justice being done under it; as the auditors are, at common law, empowered to find a balance due to either party.<sup>1</sup>

It appears desirable, also, to alter the law in this as it has been in other cases altered with regard to the right of appeal from the judgment *quod computet*, on which, as the law at present stands, it is held no writ of error lies.<sup>2</sup>

<sup>1</sup> 2 Instit. 380.

<sup>2</sup> Metcalfe's case, 11 Co. 18.

Another and very important matter to be settled, in order to render the proceeding by way of action of account conducive to the ends of justice, is the regulation of the costs to which the respective parties should be entitled; for it is apparent that the judgment *quod computet* ought not of itself to entitle to costs the party seeking the account, should he afterwards turn out to be the debtor, and not the creditor under it.

Justice seems to require that, if any balance be found due from the party called on to account, the law should remain as it is; viz., that judgment may be forthwith signed against him for arrears and costs; but, on the other hand, if the balance be in favour of that party, the costs should be in the discretion of the Court, or a Judge, on a special application.

This paper, however, raises a wider question. We think a most useful inquiry might be undertaken, the object of which should be to see where legal and equitable procedure might be assimilated. The courts both of law and equity have jurisdiction in matters of account. At law the action has fallen into disuse, from the impracticability of working it. The parties are hence driven, from necessity, into equity; and how it is proceeded with there we all know. Let us then endeavour to discover some better mode, which may be common to both; — in aid of this Mr. Pulling's labours will be highly useful.

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#### ART. XI.—THE ACTS OF LAST SESSION, AND THE CHANGES MADE BY THEM IN THE LAW.

THE last session of parliament was the longest ever known; not only the longest in the number of days, but also the longest in the number of hours in each day. It has been said that, notwithstanding this, the House sat to no purpose but to talk and wrangle; and that though the reapers were many, the harvest has been small. This may be so in other departments of legislation, but so far as Law Reform is concerned, it has been a most remarkable session, not only for what

has been actually done, but for what has also been furthered and set in motion. It augurs well for the new parliament, that in its first year its members set themselves so manfully to work, to remedy the great defects in our jurisprudence. There is scarcely any department of our law which did not come before them, and on which they did not lay the amending hand; and if some acts are still imperfect, and some bills were left unpassed, yet a great commencement has been made. Let us first place under very general heads the most important of the acts (11 & 12 Vict.) that passed. We shall afterwards notice more particularly some of the more prominent.

### *I. Law of Property.*

Law of Entail (Scotland), c. 36. [See *antè*, Art. IV.]  
 Facilitating Sale of Incumbered Estates (Ireland), c. 48.  
 Proof of Proclamations on Fines dispensed with, c. 70. [A very useful act.]  
 Transfer of Land facilitated, and the Practice as to Registry and Judgments improved, c. 120.

### *II. Chancery Reform.*

Certain Chancery Officers empowered to take Oaths, c. 10.  
 Act facilitating the winding up of Joint-Stock Companies, c. 45.  
 Power to Commissioners of Bankruptcy to release Bankrupt from Prison in certain Cases, c. 86.  
 Offices in the Petty Bag regulated, c. 94.

### *III. Common Law.*

Game Laws repealed, under certain Regulations as to the killing Hares, c. 29.  
 Acts as to Poor Law Removal, and other Poor Law Improvements, cc. 31. 110. 111.  
 Acts consolidating the Law relating to Magistrates, cc. 42, 43, 44.  
 Act for promoting Public Health, c. 63.

### *IV. Criminal Law.*

Prevention of Crime (Ireland), c. 2.  
 The better Security of Crown and Government, c. 12.  
 Acts facilitating Administration of Criminal Justice, cc. 46. 78.

[The latter establishes a Court of Appeal in criminal trials on matters of law.]

#### V. *Inquiries prosecuted before Committees.*

Criminal Law Consolidation (House of Lords).

Bankruptcy Law Consolidation (House of Lords).

Agricultural Customs (House of Commons). [See Art. VIII.]

We do not now notice several important *bills* which were introduced by the Government, or by individual members of both Houses, and which were postponed on various grounds.

And *first*, as to the law of Property.

The act for facilitating incumbered estates, though it is strictly confined to Ireland, must be considered as an experiment made for the benefit of the whole kingdom. Although, no doubt, many persons voted for it as applicable to the peculiar condition of Irish tenures and people; yet the Solicitor-General, who had charge of the bill in the House of Commons, said more than once that he was willing to extend it to England.<sup>1</sup> Its provisions, therefore, are of considerable importance, and are well worthy of attention, as being a remarkable step in conveyancing reform. It must be looked at in two aspects: 1. That part which is to be worked through the medium of the Master's office; 2. That which may be effected without his assistance. And here we may observe that the bill would never have passed the House of Commons unless parties had been enabled to dispense with the assistance of the Master; another proof, if any were wanting, of the desire for reform in Chancery. 1. By s. 2., when an estate shall be encumbered, the owner may, subject to the approbation of the Court of Chancery, contract to sell the same; and (s. 6.) may apply, *by petition* in a summary way, to the Lord Chancellor of Ireland to confirm the sale or contract for sale. The petition is to set forth the incumbrances and other charges affecting the lands, *and such petition shall be verified as the Court shall direct* (s. 7.); and may, for this purpose, refer the same to the Master. And now begin a series of clauses; the fruit, as we know, of careful and repeated consideration, for providing for the proposed investigation and verification (ss. 11—26), of which it is only

<sup>1</sup> Hansard, vol. 100. part 21., Oct. 1848.

necessary to specify one (s. 15. The Master, before proceeding upon any inquiry, is to cause notice to be given to all persons who shall *appear* to have an interest in the subject of inquiry), to prove to any one acquainted with that Court, that until the procedure of the Master's office is reformed, the delay and expense would be so enormous that, except in special cases, it will not be generally resorted to. Before the Master's report, of course, no sale can take place; and although, in some instances, we believe it will be quite possible to pass an estate through the Master's office without any great loss of time or of money, yet we are convinced these will be exceptions. Let us state, however, one inestimable advantage to persons who avail themselves of this machinery. By s. 27., the assurance to the purchaser under the act shall be effectual to pass the land and the fee simple thereof, discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever, of her Majesty, her heirs and successors, and of all other persons whatsoever, save and except such charges and incumbrances, if any, as shall be thereby excepted. This is a great principle to have established, for which we have repeatedly contended.<sup>1</sup> It is only necessary to add, that the purchase-money is to be paid into the Bank of Ireland, to be applied in the discharge of incumbrances or otherwise, according to the right of the persons interested in such land (s. 29). It is also to be observed, that this act furnishes another instance of the application of the principle of proceeding by *petition*, to which we have elsewhere alluded; and this becomes doubly important when we remember that the Lord Chancellor brought in the act, and has thus sanctioned the principle.

But we now turn, with much greater pleasure, to the other portion of the act. Under this (s. 30.) the owner of land subject to incumbrances may sell *without order of the Court*, unless restrained by order after publication of notices: so may an incumbrancer after notice and neglect of owner (s. 31.). And what notice is it to be? It is to be given (s. 32.) by every owner or incumbrancer proposing to sell

<sup>1</sup> See 6 L. R. 655. 7 L. R. 175.

<sup>2</sup> See *antè*, p. 21.



land at least once in four successive weeks, by advertisement in the "Dublin Gazette," in two newspapers published in Dublin, and one newspaper in the county where the land is situate, and in the "London Gazette," and a copy of such notice shall be posted on the church (if any), and on the Roman Catholic chapel (if any); which notice is to describe most particularly the lands intended to be sold, and an affidavit shall be made that all the notices required have been given, (s. 37.)

But there is a further provision which is of more doubtful merit. By s. 35., when the owner of land proposed to be sold shall not be entitled to an estate of inheritance, *personal* notice is to be served on persons having estates in remainder or other future estates. There then follows another series of clauses (ss. 34—44.) for carrying this part of the act into execution, two of which are of such importance that we shall fully abstract them. We allude to ss. 41. and 42. On a sale without order of the Court, on the payment of purchase-money into the Bank the conveyance shall be an effectual disposition of the land, as against the person making such conveyance, and as against the owner mentioned in the notice set forth in the affidavit; and all persons entitled, or who may become entitled under the settlement, will, or assurance mentioned in such notice, and all persons interested in incumbrances mentioned in the notice; *and after the expiration of five years from the time of the payment of such purchase-money into the Bank of Ireland, such conveyance shall have the same operation as if the sale and conveyance were under the order of the Court, under the provisions hereinbefore mentioned, i. e. shall give a title against all the world* (see *antè*, p. 185.). But by s. 44., rights prosecuted within five years are not to be affected.

Now these are admirable provisions so far as principle is concerned, and would, indeed, do good to all parties concerned. They establish, in fact, under certain restrictions, a statute of limitation of five years — surely a step sufficiently bold? But how is this principle to be worked out? In this series of clauses we have a machinery of notices, affidavits, and regulations of sales, which is nearly as complicated as

the machinery of the Master's office itself; and every now and then it is absolutely necessary for the parties to obtain the assistance of the very Court of Chancery, the great object being to avoid it. This, we are satisfied, it will be next to impossible to do. Sooner or later — begin at which end of the act parties please — try what method they will — into the Court of Chancery will they come. And what is the remedy for this? One that we have repeatedly pointed out. An independent tribunal for carrying this act into operation must be erected, whose duty it will be to explain and simplify its operation; to regulate the sale of land coming within its jurisdiction; but, more than any thing else, not only to reduce the professional expenses connected with the working of the act, but *to override and controul legal subtleties and crotchets, which are already beginning to settle upon this act, and which will, if left alone, destroy its beneficial operation.* We shall not allude further to them; because the bare mention of any specific doubt of this nature, even to contradict it, is to give it some consequence.

Our humble advice, then, in furtherance of the success of this measure, is, that its excellent principles shall be worked out by a special tribunal, to be established for the purpose; nor does there seem any great desire to bring the act into operation. By ss. 8 & 36, the Chancellor, with the advice of the Master of the Rolls, is to make orders for carrying both portions of the act into effect. As these orders have not appeared, we presume the act has not yet been acted on in any respect. This may be well accounted for — first, by the long vacation; and next, by the present unsettled state of Ireland.

But say that the orders are made, there will be the five years' interval between the period at which the sale takes place and the purchase is complete; and we are quite willing to admit that this is as short an interval as could properly be allowed for the discovery of and provision for lawful claims and demands. These, however, we are persuaded, will, after a proper investigation, be few; and surely there can be no better opportunity for the introduction of the principle of an insurance of titles,<sup>1</sup> than the

<sup>1</sup> See this principle fully explained in 7 L. R. 154. 391—400.

application of it to insuring against all claims and losses for this interval. We are much pleased to see the rapid progress<sup>1</sup>

<sup>1</sup> We are very glad to confirm our own opinion by one or two others: — "Mr. Stewart's proposal for securing the title to all real property by a system of insurance, is an admirable suggestion, capable, if properly developed, as its author himself anticipates, of raising the saleable value of land, perhaps from thirty to forty years' purchase, and of realising an immense sum to the Exchequer in the form both of a moderate tax on such assurances, and of the increased stamp duty which would be received on the vast increase of sales which would follow from such simplifications as he suggests in the title and conveyance of landed property." (Mr. Poulett Scrope's "*Plea for the Rights of Industry in Ireland*," Hatchard, 1848, p. 43.) Let us add the following valuable observations of the "*Jurist*" of August 26. last. After quoting a portion of Mr. Stewart's lectures on the transfer of land, the writer goes on thus: — "The idea of a Title Insurance Office will, no doubt, appear to many at first sight singular; but a little reflection will show that it is not in any degree more singular than that of a life insurance office. The principle of insurance is simple enough. It is this; that the *average* of uncertainties may in general be measured, though the *individual uncertainty* cannot. Thus, for instance, it is impossible to calculate how long a particular life will last; but it is quite possible to calculate with a degree of precision inferior only to mathematical certainty, what will be the average duration of life in a body of a certain numerical extent. So, although it would be quite impossible to calculate what number of dry or of wet days there will be in any one year, it would be quite possible, if sufficient observations on the past were collected, to calculate how many there will be in a century, or some other term of sufficient duration. It would seem, in fact, that events are only uncertain in their individual and separate character; but that all events of every known kind are certain to happen some given number of times in reference to a given period and a given number of objects of those events; that although, for instance, it is uncertain whether any individual person will live to a given age, it is certain, or almost certain, that the sum of the several ages at which any 10,000 people living in the same locality will die, will be a uniform quantity.

"Now, what is there in the uncertainty attaching to titles which should exclude them from the application of this doctrine? A title to land never can be said to be perfectly certain. With all the care and skill that may be applied to its investigation, of course by reason of error or of concealment of facts, it may be subject to some unseen defect. The chances of defect will, of course, be in general in the inverse ratio to the amount of skill and care bestowed upon it. But the element of uncertainty in the detection of the defect at all, and in its detection, if at all, by the right persons, comes in aid of its security, and various other questions affect it, which would of course render any *à priori* calculations, as to the average loss of estates by bad titles, impossible. But, as in all such cases, an approximation to the average may be obtained by a mixed process of observation and calculation, so that, with the aid of statistical investigation, and calculation founded thereon, it would be as easy to say what premium will cover the risk of assuring a title of any given kind, as it is to say what premium

which this subject has recently made, and is making ; as we are sure that it is the clue to a very extensive but very safe and beneficial change in the practice of conveyancing, and is applicable to Irish as to English titles.

We are the more inclined to recommend this proposal for adoption in Ireland, because an act was passed last session (11 & 12 Vict. c. 120.), which proceeds upon the basis of dispensing with the repetition of the investigation of title so far as the registry is concerned. By s. 1. the registrar of

will cover the risk of fire or of life. It will be objected, doubtless, that the tables of insurance would be complicated, requiring to be varied according to a variety of circumstances ; that the premiums that would cover the insurance of an estate that has been mortgaged and sold over and over again, and has been for generations before every conveyancer of eminence, would be different from that which would be required for a family estate continuing in the same family for generations ; that a title in which there had been many entails could not be insured in the same way as one continuously in fee ; that when you come to titles having apparent defects, such defects are of kinds so various, that the scale of premiums would be infinitely complicated. But conceding, that if, in reference to every species of defect, it were attempted to calculate the precise value of the contingency, and to apply an amount of premium perfectly proportionate to the contingency, the affair would be impracticable ; it is answered, that no such minute accuracy need be attempted in reference to this, any more than it ever is attempted in reference to any other species of insurance. All that is attempted in life assurance, and all that need be attempted in title assurance, is to obtain an estimate of the mean of the various contingencies affecting titles of the same class, comprehending in each class different degrees of danger, just as in life insurance the mean risk of life is taken in reference to what is generally termed a healthy life, although it is well known that there never are any two lives on a precise equality in point of health.

“ The objection, if any such be attempted, that such a system would destroy the occupation of the profession, is scarcely deserving of a moment's notice. In the first place, the thing to be considered is, not the occupation of the legal profession, but the improvement of the security and marketability of titles ; and if that can only be obtained by the sacrifice of the profession, why then the profession had better wrap its robe around it and die decently, for die it must. But in the second place it is pure assumption to say that any such changes would really injure the profession. That it would, after the first general investigation of titles, materially diminish the business of preparing and investigating abstracts, we doubt not ; but if it took effect by way of increasing the security and marketability of titles in exactly the same ratio, or, perhaps, in a higher ratio, it would increase the business of buying and selling estates, and all the professional business consequent thereupon. Much more might be said upon the subject, but we now leave it in the hands of our readers, hoping and believing that it will not be allowed to drop, and that in some form and to some extent, insurance of titles will be added to the business of insurance offices.”

deeds, previous to giving out any negative search, is to cause a copy to be recorded. Books containing copies of negative searches are to be numbered, and the number and page are to be indorsed on the original search (s. 2.). Indexes are to be provided for such books, which may be searched without fee (s. 3.). Attested copies of recorded searches are to have the same force and effect, and shall be accepted and received in the same manner as a new search (s. 4.). This is an admirable act to the extent to which it goes, and will save enormous expense and difficulty in the transfer of land. Altogether we are well satisfied, in spite of its defects, with the legislation of the last session with respect to real property, and we feel exceedingly grateful to the Lord Chancellor and to the Solicitor General for doing so much.

Indeed we have now no doubt that all will go well. If it is possible to facilitate the transfer of land in this country, professional ingenuity will discover the means. The owners of land are getting thoroughly to understand the subject, and the desire for an alteration manifests in the most unexpected quarters. An inquiry took place before a Committee of the House of Commons last session, on the management of the office of Woods and Forests. Mr. Crawley, one of the respectable solicitors of that office, is called before it. He was evidently a little surprised to have to answer the following questions:—

“ 1370. *Lord Duncan (the Chairman)*. Might not conveyances be greatly shortened without injury to the security of the public?—*That is a question which I am hardly competent to answer.*

“ 1371. Are you aware that in purchases made by railway companies of late years the forms of conveyance are much shorter than those formerly in use?—I believe they are; they are under particular acts of parliament, and the forms are given in the acts.

“ 1373. Do those recitals add any strength to the conveyance?—With all submission I think your lordship should hardly ask me my opinion upon questions which affect the general law of real property and conveyancing, *and upon which conveyancers themselves entertain very different opinions*; the recitals explain the conveyance and explain the title.

“ 1374. *Do they add any strength to the conveyance?*—I think

they do, by explaining the title and showing that all persons whose concurrence is required are parties to the conveyance. (?)

"1375. In cases of purchase for public purposes, is it necessary to burden the deed with long recitals? — Each case must depend upon its own circumstances.

"1377. *Do you mean to say that if all the recitals were omitted the deed would be less binding on the vendor?* — No; I DO NOT MEAN TO SAY THAT.

"1379. Are not the recitals chiefly valuable for the purpose of preserving evidence of title for the benefit of parties intending to sell again, which is not the case with the Crown? — I should say they are chiefly introduced to explain the title with a view to subsequent sales.

"1380. Is it not for that reason that railway companies have to a great extent adopted shorter forms, curtailed recitals, and consequently cheaper conveyances? — It may be so."

Lord Duncan really knows as much about recitals as any one, but Mr. Pemberton, Mr. Crawley's excellent partner, is then called, and comes off no better: —

"1478. Might not the conveyances be greatly shortened without injury to the security of the public? — That is rather a *grave* question, which it would be difficult for me to answer. I have no doubt that many conveyances are longer than they ought to be, but whether or not a system could be adopted for shortening every conveyance is a question which I could not venture to answer; it requires the experience of the first conveyancers in the kingdom to answer it, — in fact the Real Property Commissioners have been engaged on a similar inquiry for some months without being as yet able to answer that question, I believe.

"1479. Are you aware that in the purchases made by railway companies of late years their forms of conveyance are much shorter than those formerly in use? — Certainly there is a form prescribed by the act.

"1480. Do not the recitals in all conveyances usually form a great part of the whole deed? — *Yes, necessarily so; because unless the story, which is the inducement to the operative part of the deed is clearly and distinctly told, the operative part may fail for want of that explanation.* [May not the effect be also controlled by some mis-recital?]

"1482. In cases of purchases for public purposes, is it necessary to burden the deed with long recitals? — Yes, frequently it is.

"1483. But railway companies do not so? — No; because railway companies purchase with a view of not parting with the

property again: in the ordinary case of a purchase, a man looks not merely to the security of his own purchase, but to what may be required hereafter in case he should sell; that makes an essential difference between the two cases.

"1484. *Does the Crown make a purchase with a view to sell the property again?*—Not generally; and therefore those recitals only need be inserted which are necessary for the clear explanation of the purport and object of the deed.

"1486. *Chairman.* If all recitals were omitted from the deed, would it be less binding on the vendor?—*It might not, perhaps, be less binding;* but, unless the deed explained its meaning clearly, it might create ten times the expense that it was intended to save by the litigation which would arise out of it.

"1487. *But it would not be less binding?*—It might not be less binding; but in that case it would not save expense in the end; the object being clearly to explain the purport of the deed and the inducement to the conveyance.

"1488. *Would it be less binding?*—It is impossible to say whether it would or would not be less binding; a thousand instances may arise, each of which would require a separate explanation; it would in many instances be less binding if the recitals were omitted; and, probably, in some instances the deed would fail altogether to be binding for want of clearness and perspicuity [?].

"1490. You say that you are aware that railway companies have to a great extent adopted short forms, curtailed recitals, and, consequently, cheaper conveyances?—Yes.

"1491. Do you think it would be possible for you to adopt shorter forms?—It would not be possible for me to answer the question; *we ought to have a committee of conveyancers to answer the question satisfactorily.*

"1493. *Viscount Morpeth.* Is this one of the questions which has been under the consideration of the Commission on Real Property?—Yes; *and the inquiries of that commission will not, I believe, tend materially to shorten deeds<sup>1</sup>, and I apprehend for this reason,* that you can only shorten the operative part of the deed; it is impossible to do away with the necessity for explaining the inducement to the operative part, you must enter into an explanation of the circumstances of the persons who are parties to it, and state what their several interests are.

In spite of this stout evidence we are persuaded that in

<sup>1</sup> We hope Mr. Pemberton is misinformed here, because if the Commissioners recommend a registry, *that will surely have the effect of shortening recitals.*

most cases recitals are not only useless, but do more harm than good; and we would sincerely recommend the whole of the profession to consider the subject well, with a view to dropping them in nine cases out of ten. There is, we believe, a sincere desire to shorten forms. But no mode of drawing, however concise, will be half so beneficial as the omission of recitals. One eminent conveyancer (whom to name would go a long way to insure followers) has adopted the practice of omitting them in almost every case, and "let us paint an inch thick, to this favour we must come." We certainly do seriously propose this kind of general disarmament, and we are satisfied that only one thing is wanting to secure its adoption, viz., the abolition of remuneration by length.

The desire for conveyancing reform thus shows itself in the Commons. We shall find it has also spread to the colonies. They have found out there, as elsewhere, that the present cumbrous system depreciates the value of land. This feeling thus breaks out unexpectedly in a Committee of the House of Lords on Colonization which sat last session: —

"2309. *Lord Monteaale*. What are the laws in the colony with respect to the mode of conveying titles to lands or assigning lands? — *Mr. Jackson*. All the English system, as descended from our old feudal tenures, has been introduced into the colonies with the general body of English law.

"2310. You mean our laws of real property? — Yes.

"2311. Has the consequence of that been considerably to augment the expenses of acquiring titles? — It has made, of course, the instrument of conveyance a very expensive one. I have known it in South Australia frequently to cost more than the value of the land.

"2312. Are you speaking of sales between individuals, or sales made by the government to individuals? — Of sales between individuals. A grant from the Crown is not a very long document. In South Australia, for the Crown grants, a very short document, prepared, as I understood, by a very eminent conveyancer in London, was adopted, of about eight or ten lines, which was held to convey every thing that can be conveyed in fee simple.

"2316. Does not the pressure bear with peculiar weight upon small parcels of land? — Undoubtedly: in South Australia, as I



have said, I saw many cases where small parcels of land were sold, and the instrument of conveyance cost more than the land itself.

"2320. With a view to the future stability of the government of the country, is not the encouragement of that class [of small landowners] of very peculiar importance?—I think it is very desirable, as concentrating a population in some measure in a natural way.

"2321. All those objects would be, in your judgment, promoted by diminishing the cost and simplifying the mode of effecting the transfer of land?—Undoubtedly they would."

**Another witness gives nearly similar evidence :—**

"1239. Do you consider that greater facilities would be given by greater simplicity of legal conveyances and assurances of title than at present exist?—*Mr. Lefroy.* The present system of the conveyance of land and other real property in Australia is the same as exists in England, and no doubt it produces the same effect of obstructing sales and purchases of land and real property of all sorts as it does in England.

"1246. Should you see any difficulty in having a surveyor-general in those colonies, and having a registration of the lands sold, the titles being fixed in reference purely to the entry upon the register?—I see no difficulty at all in it. I cannot see why a sale of land in the Australian colonies should not take place simply by making a transfer in a book kept by the surveyor-general, perhaps in the presence of a magistrate.

"1248. Where the individual has, as a shepherd, for instance, realised sufficient money out of his wages to become a landed proprietor, would you not, under those circumstances, wish to afford him every opportunity of becoming so?—As soon as he should have saved such a sum of money as would enable him to start with a flock of sheep—to start as a small capitalist, in fact—it would be highly desirable that he should be able to do so.

"1249. Then are not those difficulties that you have described as resulting from the introduction of the English modes of conveyancing into the colony, with this complication of expense, a peculiar burden upon the small proprietor who seeks to acquire land?—I think they present a great obstruction to dealings in land in general."

It is surprising to find how strong and how widely-diffused is the desire for a great change in the mode of transfer and

proof of the title to land, and we have no doubt whatever that this subject will come before Parliament next session in a very distinct form.

## II. *Equity.*

The most important Act under this head is unquestionably the Joint-Stock Companies' Winding-up Act. To the law reformer this statute is one of high interest; not so much on account of the magnitude of the affairs it deals with, as on account of the novelty and importance<sup>1</sup> of the principles of procedure it introduces into that most detestable part of our most detestable court of justice, the Masters' office of the Court of Chancery.

There do not probably occur a dozen cases per annum of joint-stock companies dissolving themselves, and requiring to be wound-up; and a small proportion only of those dozen cases require the assistance of courts of justice; and if this Act is found to be an efficient one, the proportion of those who in future will need court assistance will be greatly lessened. The value to the public of any legal machine is by no means to be estimated from the number of cases which call it into action. The preventive effect of an efficient law is its highest and truest value to society. And we have little doubt that the mere passing of this Act will cause many companies which have remained unwound up (for instance, because shareholders had calls to pay; and would not pay, as there was no practical way of compelling them,) to be now wound up, without the need of recourse to its provisions. We do not value this Act, therefore, because of the magnitude of the cases it has to deal with. Let us see it wind up one single case well, and we shall be satisfied to pronounce it one

<sup>1</sup> This Act is also of much importance and interest from the care bestowed on it, both in and out of the House, by most of the members of the Equity Bar now in Parliament, and more especially by those who are members of the Fees' Committee. Where all were willing to assist, it is perhaps invidious to particularise one, but it is well known that Mr. George Turner bestowed unwearied pains in settling the details, and was also the able defender of the general principles of the measure in the House. — ED.

of the most important Acts relating to the procedure of the Court of Chancery which has been passed in our day. For the scheme of procedure it adopts, if it answer for joint-stock companies, will be also applicable to the larger number of cases to the discharge of which our great trustee Court is at present so entirely incompetent.<sup>1</sup> To these bantlings she is at present an unwieldy nurse — she first dandles them in Court, then puts them to bed and to sleep in the Masters' office, and there overlays and stifles them with the weight of herself and of the layers of forms with which she always keeps herself enveloped. This Act takes the poor sufferer, to a considerable extent, out of legal nurse, and almost entirely disencumbers it from the enfolding forms.

To show the probable value of the Act, we will begin with explaining to our unlearned readers, as well as we can, why the Court of Chancery cannot now wind up a partnership. Contested cases are yearly going into its hospital, but they never come out cured: they die there, and yet are never dissected for the benefit of legal science. Why cannot the cure be effected? We will put the simplest case. Take the following. Suppose a concern with only two partners, each entitled to half the profits. As the junior partner gives the greater personal service, the senior puts in 20,000*l.* capital to the junior's 10,000*l.* Beyond, all the capital is equal, or rather interest is allowed on all capital beyond, of which there is a vast sum. Both partners die: the junior survives, and nearly winds up the affairs. All the estate is got in; but the ultimate division is required. The exact net profits have never been taken; but gross profits, not deducting bad debts, have been divided into two parts, and one added to each partner's account, thus avowedly showing to each partner's credit a very much larger sum than the concern, on winding up, could possibly pay. How is this deficiency to be borne? The executors of the junior say out of the 20,000*l.* and 10,000*l.*, *i. e.* that the

<sup>1</sup> Master Farrer, in his recent pamphlet on the Masters' Offices (which we have already fully noticed, see Art. I.) would seem to concur with us in this view. He refers to this Act as a measure which will materially increase the duties of the Masters, and promises their co-operation. (P. 30.)

senior's estate is to bear two thirds of the deficiency. We don't observe on the legal merits of the question. Our readers may think it a foolish one — so do we. But this the question is. The junior's executors have all the assets; they admit that, on their own showing, they have, say, 8000*l.* to pay to the other estate; and the senior's executors claim 30,000*l.* The junior's executors (this our Courts allow) are nimble at first, and become *plaintiffs* in a Chancery suit to take the partnership accounts. Once having the conduct of the case, they move slowly enough. The cause is heard in two or three years. The point might well have been then settled; but no! — our Courts don't give decisions on points of bare principle: the accounts are sent to the Master for him to take, without telling him how to deal with this deficiency. Once declare this point, and the parties could, and, if they were honest, would, at once settle all beside. The Master can't make a report of mere principle; saying that such were the facts, and I think the principle of division should be so and so. The Court does not allow this: he must first determine the principle, and then state and report the accounts in figures; and then the report of figures must be excepted to, in order to raise the question of principle involved on appeal. But though the real question is so simple, the items which go to make up the balance-sheet and to show the exact amount of the deficiency are very numerous. The plaintiffs have to pay some sum in any event: they find the Master is against them on the principle, and they then require every figure to be proved. They have the stake in hand, and being plaintiffs, they cannot be forced to pay it into Court. They claim to hold it without paying interest: their policy is one of procrastination. *In every account—inquiry between debtor and creditor this must always be the case with the debtor.* And so each one of hundreds of items becomes the subject of a distinct inquiry, entered into by one party solely for delay. Each item must be proved by evidence as voluminous as would be required for many a case at Nisi Prius. When would such inquiry end? The case we have put is, perhaps, the simplest case of partnership conceivable, and yet, in that case, we say, without

hesitation, Never. The time to be required, like the parallax of the fixed stars, is incalculable.

Reader, this case is no suppositious one: we can refer to it, if need be, by name. Two or three years were taken in getting into the Masters' office — seven years were occupied there. A not inactive nor very incapable solicitor personally looked after it as solicitor for the senior partner's executors; a gentleman by no means unfairly captious opposed him for the junior's; and at the end of seven long years the plaintiff was forced to compromise the suit.

Multiply your two partners by 100 or 1000, multiply your difficulties in some larger ratio, and you have then the joint-stock company partnership; and then apply your old Chancery procedure to that case. This of course would be absurd.

Such being the disease, what should be the remedy?

The statute 7 & 8 Vict. c. 111. was passed to meet this evil. It has never yet been used. Scarcely has there been an attempt to bring a case under it. The Act was framed, we feel bound to say, in most lamentable darkness as to the real evil and the real remedy. The scheme of that Act was to make a *quasi* bankruptcy of the joint or partnership estate, and to leave the partners still individually liable, and in the possession of their private property. A creditor was to set it in motion. But the proposed proceeding might as well have been called a Lunacy. For what creditor would be such a lunatic as to go to bankruptcy for a mere dividend, and that for all the other creditors as well as for himself, and that, too, only out of the *joint* assets, when by suing at law he might have recourse, for his own exclusive benefit, to both the joint and separate estate of every shareholder.

On the occasion of the passing of that statute, the views just expressed were represented, on behalf of a dissolved joint-stock company at Liverpool, to the Board of Trade, by the gentlemen<sup>1</sup> who ultimately drew the scheme of the present Act; and shortly before Sir Robert Peel's government retired, the Board of Trade resolved to have a new bill prepared in conformity with the principles carried out in the

<sup>1</sup> These gentlemen were, it is well known, Mr. Rigge, of Liverpool, and Mr. Edwin W. Field. — Ed.

Act we are about to review. Some of our contemporaries have surmised that the recent Act was drawn without the aid of persons of much practical experience. So far from that being the case, the bill was put in type and circulated, by direction of the Board of Trade, among the Masters, Masters' clerks, record and writ clerks, registrars, and other officers of the Court, and received very great attention from many of them through the six months previous to its introduction into Parliament. It was sent to some of the officers of the Chancery Court in Ireland, and every suggestion received minute attention. A most complete analysis was prefixed to the prints of the bill as it passed through both Houses; and the fullest criticism was courted. During its passage it was watched with great care by the members of Parliament before alluded to. The framers considered, that while the bankruptcy procedure was the only one known in England fitted to the business of winding-up joint-stock companies, the whole of the rules of law which would come into play in the administration were necessarily rules of an Equity Court. And that therefore these rules must either be imported into the Bankruptcy Courts, and those Courts be made into complete Equity Courts, with powers of issuing writs, levying execution, &c., or else that a bankruptcy procedure must be imported into the Masters' office. On this latter principle the Act is formed, and the plan is carried out in the following way.

Any partner having an interest in winding-up a joint-stock company may petition in a summary way to have it wound up. This petition he may serve, and advertise and circulate by post, in such way as he thinks most likely to satisfy the Court that as full a notice of the application has been given as the case requires. On the hearing, if the Court is satisfied that there are sufficient grounds for the order, but it desires further notice to be given, it may make, if it please, an order *nisi* (an entire novelty on merits, in Equity), and require such order *nisi* to be served or advertised as it may think most likely to meet the notice of all concerned. And when satisfied both with the need of interposition, and that there has been sufficient notice, then it may issue its fiat for

winding-up. In this method the framers proposed to satisfy the principle of the Equity Courts (a principle which true justice must always imperiously insist on), of having all parties interested made, as far as possible, parties to the proceeding. Or rather they satisfy the true exigence of the principle, and yet avoid all the technical difficulties, practically so insuperable, of naming them parties to the record, by making them *privies* to it.

This first process is analogous to what the fiat in bankruptcy was before it was allowed to degenerate into a mere empty form: and, except by way of appeal, the Court will hear no more of the case after it has made the winding-up order. The Master first appoints one or more official managers. By their appointment all the real and personal estate is vested in them. They are *the Company*. They make out and complete its accounts, and the accounts they make are *prima facie* binding. In this way it is intended to avoid all power of procrastination by the debtor accounting-party. From time to time, at their instance, the Master makes calls. These calls are debited to each shareholder's account. If the debit makes him on its balance a debtor to the concern, he is ordered to pay it. On notice, and after allowing time for appeal, the Master makes an order for paying the balance. This order has the force of a judgment, and execution can be issued on it, not only in England, but in Scotland or Ireland also, without new suit in those countries.

All appeals are by motion to discharge the Master's order, — the cheapest and quickest form of appeal known among our different schemes of procedure.

The Masters have power to act for one another without order of transfer. Indeed the Act wisely contemplates sending all these cases, or perhaps only the earlier ones, to one and the same Master, instead of sending them into the office by rotation. The good effect would be the establishment of a uniform usage and practice, which will much facilitate the working of the Act hereafter.

Full powers to compromise all claims are given to the official manager and the Master. No shareholder will be

able to plead the non-payment and insolvency of another shareholder as a reason why he should not pay what the liabilities of the concern require from him. Thus the insuperable difficulty of our present Equity procedure, the need of adding assignees of a bankrupt, executors of a deceased, &c. to the record, is attempted to be got over, without sacrificing the real justice of the case. And if too large a sum is raised by calls, or where there are otherwise assets to distribute, the official manager is charged with the task of distribution. In all matters, however, being under the Master's control.

Another principle, new in Equity, and yet of vast moment to the procedurist, and of peculiar *scientific* interest, is introduced by this bill. The analogy of assignee-choosing is adopted from bankruptcy; and where there are questions of *class* difference arising between sets of shareholders, each set is to *choose* its representative to discuss the question in their behalf.

The Act is one entirely in the interest of shareholders, and is merely a substitute for a dissolution suit. Creditors are therefore no farther affected by this bill than that, after an official manager is appointed, they are bound to send in proof or claim for their debts before the Master, so as to enable the official manager to raise and pay them, if he thinks the debt due. The Act, however, allows the Master, *with the creditors' consent*, by issue or otherwise, to put the validity of the claim in course of trial.

An important addition was made to this Act in the House of Lords by the Lord Chancellor. By a few words introduced into the title, preamble, and the 19th section, he has enabled the Court, on the hearing of any suit for dissolving or winding-up a common partnership, to order it to be wound-up under this Act.

It is also to be observed that service of orders, &c. under the Act by *post* is, for the first time, made good service.

Such is a general outline of the *novelties* of the present Act. We suppose we shall next, according to usage, see our judges, or some of them, attempting to thwart its objects and working in every way in their power, wishing thus to show their contempt for an effort in the cause of legal improvement which,



if it prove altogether abortive, at least deserves respectful consideration from every one who desires to see the laws and Courts of his country objects of consideration and respect.

### III. *Common Law.*

Opinions differ as to the beneficial working of our system of Special Pleading, as it prevails in our Courts of Common Law. Some think that the precision and certainty with which it brings parties to issue on definite points of fact before a jury, or definite points of law before a Court, are of inestimable value, notwithstanding the occasional hardship which the rigour of its rules creates. Others think that the scandalous defeat and ruin of honest suitors, on account of mere lapses in abstruse and archaic technicalities, which every term and sittings display, more than overbalance the theoretical excellence of our pleading rules, and any practical advantages that they confer. But there can be no difference of opinion as to the unmitigated curse which a system of special pleading must prove, when introduced into matters which never required any refinement of the sort, which are carried on in every town and rural district by men of no very high intellectual grade, and which, when litigated, are litigated before tribunals where nine tenths of the judges are destitute of legal education, and where there is no power to direct those amendments by which our higher Courts often mitigate and partially repair the severity of the quirks and crotchets of our "*Doctrina Placitandi*." Yet such has been the case for the last thirteen or fourteen years, as every one must have felt who has been in a Court of Quarter Sessions while a poor-law appeal has been going on, and who has reflected on the nature of the real matters in dispute between parishes as to a pauper's settlement, on the class of persons from whom parish officers are generally chosen, and on the intellectual calibre and training and the usual occupations of the country gentlemen who, on such occasions, sit as judges both of law and fact.

Mr. Archbold very truly remarks, in his introductory

observations to one of the little works whose names we have quoted below<sup>1</sup>:—

“The law upon these subjects has been in an unsound and very objectionable state from very nearly the passing of the Poor Law Amendment Act in 1834. So many subtleties have been introduced into it, so many nice points made, so much ingenuity continually exercised in devising new ones, that the examinations had to be prepared with the same certainty as a plea of estoppel, and the grounds of appeal required the exercise of as much acuteness and astuteness as a special demurrer. This originated partly in an unfortunate provision in the Poor Law Amendment Act, by which it was required that, upon obtaining an order of removal, a copy of the examinations on which the order was made should be sent with the notice of chargeability to the opposite parish. The object of the legislature, in this provision, was obvious enough; they thought it right that the parish to which a pauper was removed should be apprised of the particulars of his alleged settlement there, and they ordained this as a means of conveying the information, in the same manner as they directed that the parish appealing should give the respondents a statement of the ground of appeal; but they evidently never intended that any errors or omissions in such examinations should be matters of objection to the order upon appeal to the Court of Quarter Sessions. The appeal would be against the order, and it would be for the Court of Quarter Sessions to decide whether such order was good and valid upon the face of it, and whether the complaint recited in it was true, and the adjudication contained in it correct, according to the evidence produced to them upon the appeal; but as to the evidence produced upon the obtaining the order, it was for the justices granting the order, and not the sessions, to judge of that, inasmuch as there was no provision in that or any other statute requiring that the same evidence should be given at sessions as had been given before the justices making the order.

<sup>1</sup> The New Poor-Law Amendment Act, 11 & 12 Vict. c. 31., relating to Orders of Removal, Grounds of Removal, and Appeals, with a practical Introduction and Notes. By JOHN FREDERICK ARCHBOLD, Esq., Barrister-at-Law. London. Shaw and Sons, Fetter Lane, 1848.

Buller's Acts, 11 & 12 Vict. cc. 82. 91. 110. 114., relating to the Payment of Parochial Debts, the Audit of Accounts, the Chargeability of Paupers upon Unions, and the Education of the Infant Poor, with practical Notes and Index. By JOHN FREDERICK ARCHBOLD, Esq., Barrister-at-Law. London. Shaw and Sons, Fetter Lane.

And, perhaps, considering this Poor Law Amendment Act to be a remedial Act, this would be the fairest construction to give to it, as advancing the remedy, and repressing the evil to be remedied, by affording to each of the parishes a knowledge of the other's case before trial, and thus preventing litigation. The Court of Queen's Bench, however, took a different view of the matter, and no doubt they felt themselves constrained to do so; they held that it was for the Quarter Sessions to judge, not only of the validity of the order on the face of it, but also whether it was warranted by the evidence adduced to the justices making it — in other words, whether such evidence was strictly legal, whether the examinations were good in form as well as substance, and whether they were sufficient to support the adjudication in the order. From this originated all the objections to the legality and sufficiency of the examinations that ingenuity or subtlety could devise; and the Court found themselves forced, compelled, actually driven to those decisions, which have rendered an appeal against an order of removal in most cases a trial of ingenuity, rather than a means of trying a right of settlement upon the merits. Such extreme particularity being required in the examinations, the same was soon holden to be necessary in the grounds of appeal; and that which was originally intended as a mere notice, was deemed to require the same certainty as an indictment. All this involved the subject in difficulties, from which it could only be extricated by aid of an Act of Parliament."

This is an accurate, but a very mild, statement of a great grievance. For not only were the refinements of special pleading, as to the wording of examinations and grounds of appeal, carried to a height that Comyn, Saunders, and Chitty would have envyingly admired, but the decisions on these miserable technicalities were frequently conclusive on the unfortunate parishes for ever and ever, and whole nests of paupers, their wives, their children,

"Et nati natorum et qui nascentur ab illis,"

fixed as permanent burdens on the unfortunate ratepayers of a particular district, who were under no moral or legal duty to support them, because the parish officer or parish attorney who drew the grounds of appeal had left out an article before a noun, or had not seen the necessity of stating that a man *resided* in a house, when it was already stated that the man *actually* occupied it. And it is to be borne in mind, that the Courts of

Quarter Sessions had no power to order amendments; and that though, when respondents were defeated on these miserable technicalities, they might afterwards procure a fresh order, and prove that the former one was quashed for mere matter of form, appellants had no similar power to institute a fresh appeal, and if once beat, were finally estopped on the subject matter of the appeal.

This huge system of pauper special pleading has been at last swept away, and there is a prospect of parish appeals being tried in future fairly on the merits: thanks to the Act of last session (c. 31.), which is sometimes termed Mr. Baines's, and sometimes Mr. Justice Erle's Act. Under this Act, the examinations on which an order of removal is made are still to be taken in writing, and the clerk to the removing justices is to give copies of them at a trifling charge, when demanded. But copies of them are no longer to be sent to the parish to which the removal is made. Instead of this, the removing parish is to send a short statement of the nature and particulars of the settlement on which it removes. The appellants are still to send a statement of their grounds of appeal; but neither party is in future to be defeated on account of formal errors or insufficiencies; nor is any objection to their proceedings to be allowed, unless the Court think that the opposite party has been really prejudiced or misled, by receiving a statement of grounds of removal, or grounds of appeal, so imperfectly or incorrectly worded as not to enable the party receiving it fairly to prepare for trial. Even then the Court is to have power to direct amendments, and to adjourn the trial, on such terms, as to payment of costs, as it may think fit.

Such are the main provisions of this salutary statute, which will be found fully set out and explained in Mr. Archbold's excellent little edition of it. We fully share in his regret that another improvement suggested by him has not been adopted, namely, that of empowering removing magistrates to act upon the written examinations of witnesses taken before other magistrates. It is also much to be wished that means should be provided for enabling a parish to require its opponents to admit documentary evidence at the trial of an

appeal, as is done in the case of an ordinary action. The expense of bringing attesting witnesses to prove apprenticeship indentures, leases, agreements, &c. &c. &c. at the trial of appeals, is most onerous and unnecessary; and there can be no doubt but that all the facilities for cheapening proof given to individuals in their lawsuits are doubly proper to be given to parishes.

Three valuable statutes (for the fourth is a mere amendment of one of the three) have been brought in and carried by the exertions of the present Chief of the Poor Law Commission. We give a partial epitome of their contents from Mr. Archbold's preface, who has edited these statutes also in his customary lucid, succinct, and sensible manner:—

“The first of these statutes, as here inserted (11 & 12 Vict. c. 91.), relates to the debts of a parish, and to the audit of accounts relating to parishes and unions. It gives to persons contracting with overseers a remedy against their successors in office upon all such contracts as shall be made within the last three months of the overseers' year of office. An exception to a certain extent is made as to the bill of costs of the parish solicitor. The statute also allows of unions or parishes paying sums which may have been expended for their benefit, although, according to the strict rules upon the subject, such payment could not have been allowed in any audit of the accounts of such parish or union. It regulates the manner in which auditors shall certify disallowances or balances in the accounts they audit, and also any surcharges they may make in the course of their audit. This statute also enables the overseers of several parishes to join in the expenses of appeals against poor-rates in certain cases.

“The second of those statutes (11 & 12 Vict. c. 114.) is merely an amendment of the first, although passed in the same session.

“The third (11 & 12 Vict. c. 110.) relates to the mode of charging the relief given in certain cases in unions: the cost of the relief of wanderers, wayfarers, and foundlings in unions, shall be charged to the common fund of the union; and, upon the application of such wanderers or wayfarers for relief, they may be searched, and any money found upon them shall be applied to the common fund of the union. So the cost of relieving paupers rendered irremoveable by stat. 9 & 10 Vict. c. 66. shall be payable out of the common fund. On the other hand, the cost of relieving

casual poor, that is to say, persons becoming chargeable to a strange parish by reason of some accident, casualty, or sudden illness there, shall be paid by the parish, or (if irrecoverable under 9 & 10 Vict. c. 66.) by the union in which he resides, or by the parish or union to which he may happen at the time to be actually chargeable, and not by the parish in which he has met with the accident, &c., as formerly. As to the poor persons who are irremovable, and therefore chargeable to the union fund, as above mentioned, this statute gives the guardians the same power that overseers have, of proceeding against the relations of such poor persons, to compel them to contribute to their maintenance, and also enables the guardians to assist them in emigrating. The statute contains one other regulation, which promises to be most salutary, and was much wanted, namely, punishing persons as vagrants who apply for relief, having at the same time money or other property in their possession, or under their immediate controul, with which they may provide for their own maintenance, without the aid of the parish, and which they do not disclose to the overseer or other officer to whom they make their application. Also the regulation above mentioned as to the search of wanderers and wayfarers applying for relief, although perhaps an overstrong measure, is likely to be very beneficial.

“The fourth Act merely makes some alteration in the statute relating to the district schools for the education of the infant poor.”

It ought also to be mentioned, that one of these Acts (11 & 12 Vict. c. 110.) contains the important provision (sect. 4.), that parishes in the same union between which any question arises as to the irremovability of any pauper by reason of five years' residence, may refer their dispute to the Poor Law Board, whose decision is to be conclusive.

Another statute of this session (11 & 12 Vict. c. 111.), amends one of the numerous difficulties that have arisen out of the absurdly worded and clumsily constructed Act, by which irremovability was conferred on paupers under certain conditions (9 & 10 Vict. c. 66.). In future a parish is to have the clear right of removing a family to the place of its proper settlement, though the man, who is the head of it, may have run away, or, from some other cause, not be resident with his wife and children. Under one of the bungling pro-

visoes of the former Act, wives and children so circumstanced were generally supposed to be irremoveable.

IV. The acts relating to Criminal Law do not require very particular notice, and our space obliges us to postpone the observations we had to make upon them. We are glad to find that the Attorney-General has come forward as a law reformer, although it would seem that in one of the Acts relating to magistrates he has shown more zeal than discretion. It would be premature to express any opinion as to the alleged imperfections of the Act relating to actions against magistrates. All that we wish to say respecting it is, that there was a bill having the same title, which was drawn in pursuance of a report of the Law Amendment Society, which twice passed the House of Lords, with the unanimous consent of all the Law Lords, but was twice *stopped* in the House of Commons, and which circumstance we noticed at the time (5 L. R. 471.) All, then, that we wish to say is, that the Act which has passed is not the bill which was so recommended and approved. We are desirous that the Attorney-General should have the whole credit of the Act of last session.

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Taking all these Acts together, we cannot but think they augur well for the future labours of the new Parliament; and we would hope that A NEW ERA IN THE HISTORY OF LAW REFORM HAS COMMENCED.

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#### ART. XII. — LORD BROUGHAM ON THE FRENCH REVOLUTION.

*A Letter to the Marquis of Lansdowne, K.G., on the late Revolution in France.* By LORD BROUGHAM, F.R.S., Member of the National Institute of France. Fourth edition. Ridgway: 1848. pp. 165.

THIS work, which has occupied so much of the public attention since it was published, is brought within our jurisdiction, not only by the remarks on several interesting constitutional points which it contains, but also by its advocacy of many of those measures of law reform which we

I have frequently recommended our French neighbours to adopt. Every reflecting mind must value the deliberate opinions of one who has passed so long and eventful a political life as the noble and learned author before us; and at the present moment, when all Europe is strewn with the fragments of constitutions, reflections, which are the results of his Lordship's great experience, are not only seasonable, but highly important. We shall hasten to enrich our own pages with some of these. Speaking of the present Government in France, Lord Brougham says,

"It is equally impossible that men should care about the form which such a Government may assume, for all feel convinced that it can only be temporary. Their representatives may go through the farce of deliberating upon a new constitution; who cares about the result of their debate? Who gives himself the trouble to reflect whether a wise or a foolish system has been formed — whether knowledge, drawn from calm observation of other people's experience, from learned comparison of various schemes actually tried, or presumptuous ignorance, or vain, futile, visionary speculation, guides or inspires those who now profess to be engaged in by far the most difficult work that mortals can undertake — a work indeed hardly possible to be executed, because no man can foresee things that are afterwards to happen — and few men can even exercise full and accurate circumspection of those things that actually exist around them.

"Such thoughts naturally occur to any one considering what is now going on in the National Assembly; but who in France gives himself the trouble to consider those proceedings otherwise than as an uninterested spectator? As we at a distance, and having little to do with it, look on and wonder at these constitution-makers, and note with amazement the hallucinations of clever men led astray by theories, and resolved to profit in no one particular, by the costly, but precious experience, or the instructive example of their neighbours; so their own countrymen, for whom, or it may be against whom, they are labouring, seem to look on as if the work doing were no concern of theirs, and feel no kind of interest in its progress. They gaze as on a stage-play, and care about as little for the result of this drama as for the catastrophe of that. They look as on the soap-bubbles which are blown out by children in their sport, and are to vanish immediately — not as on those which the philosopher forms, in order to teach him the properties of light, and the nature of colours. Indeed, some political



lessons might be learnt from the blunders of these men ; but the successful wisdom of others is far richer in the instruction which its happy results convey. Be that, however, as it may, the fact is incontestable, that the debates on the constitution excite no interest among the people for whom it is now framing. France has had so many within a few years — somewhere about ten, including one or two which fell still-born from the womb of the anarchy they were conceived in — that the eleventh could hope for little attention, even had its plan been sketched out in a less turbulent season. But coming as it does, after an *extempore* Revolution and subversion of Monarchy had made way for an *extempore* Republic, the most devoted friend to the present order of things cannot affect any concern about a form of government which, in all likelihood, will have the kind of permanence with the kind of merit which may be allowed to the voluntary that a third-rate artist executes upon the organ." (Pp. 35—37.)

Again, what can be more true and practical than the following remarks? —

" I have already said that the framing a constitution for a long settled and densely peopled country, is a work which, well to execute, passes the powers of human genius. Even in the establishment of their new government, the Americans who had a nation of recent formation to deal with, and a people scattered over a boundless expanse of fertile land, did little more than change the names of their old constituted authorities. They had been used to a Governor in each province, with two Houses, on the model of the mother country. They appointed a President, a Senate, a House of Representatives in each state, and the principal change which they effected was by the Federal Union, which again was administered by the same three powers, bearing the same names. So, when a century earlier, and at a time more favourable for trying political experiments, because in the infancy of the colonies, no less a man than Mr. Locke was employed to form a constitution for the Carolinas, and thought he might give a loose to his speculative views, a plan was struck out materially differing from any form of government then known, and founded upon purely theoretical principles. But it would not work, and, after a trial of two years, was abandoned altogether.

" In truth, by far the most difficult tasks that man ever set to himself, are the making of a new constitution and a new code of laws ; but the former by much the more difficult of the two, because if there be sufficient powers possessed by the ruler, obedience to

the laws can be, though difficultly, enforced, however imperfect these laws may be, whereas the working of an untried system of government has to encounter all the resistance of man's passions, and is disturbed by the friction of its several parts. The source of the difficulty, however, is the same in both cases, the having to work with human beings, and not with inert matter, as the mechanist does. Add to which the impossibility of foreseeing future events, from the want of such fixed rules as govern the motions of matter, and enable the mechanical contriver to predict how far his arrangements are likely to succeed, providing for the removal of foreseen obstructions. Man has no faculty of foresight as to human conduct. He can see pretty clearly things passing around him; still more distinctly behind him things already past. In front of him, as to things future, his vision extends not at all. The more essentially necessary is it for him to examine carefully all that he has the faculty of observing, to profit by the experience of the past, and by the appearances of the present, in choosing his course for the future. Hence it may really be laid down as a maxim in the philosophy of politics, in the science of government, that no system can be safely constructed all at once by human wisdom, but must be the result of experience, of repeated trials, and some failures, not of inventive combination, arrogantly hazarded, but of a tentative process modestly undertaken. Laws are made; codes and constitutions grow. Those that grow have roots; they bear, they ripen, they endure. Those that are fashioned are like painted sticks planted in the ground, as I have seen trees of liberty; they strike no root, bear no fruit, and swiftly decay. Nature, indeed, as Bolingbroke says, beautifully translating a beautiful passage of Lord Bacon, 'throws out altogether, and at once, the whole system of every tree, and the rudiments of all its parts; but she leaves the growth to time.'

" ' Mulcent auræ, firmat sol, educat imber.' " (Pp. 39—42.)

While we admit the truth of this, we are far from agreeing with all Lord Brougham's conclusions. Thus, he considers as the master evil of the present French law, "that bad law which compels the perpetual and indefinite division, splitting, attenuation, crumbling down of all the land in the country—a law which has divided it into three or four millions of small patches, wholly unfit for any improved system of tillage, given constant occasion to insuperable difficulties in tracing title, prevented any thing like the formation of a landed in-

terest, and deprived the constitution of an element absolutely necessary for the good working of a mixed government." (P. 11. See also p. 9.)

Now without recommending the adoption of the French law as to the distribution of real property in this country, we must be permitted to say that it is a disputed point whether it is prejudicial to good agriculture, the authorities being very nearly equally divided<sup>1</sup>; and as to small holdings of land being adverse to the stability of a mixed government, we apprehend it will be found that during the recent revolution and most serious disturbances in France, the owners of these holdings have been almost universally ranged on the side of order and good government; and it is to them, more than to any other class, that we are to look for the restoration of confidence and prosperity in this country. It is also remarkable that in the midst of the deplorable depreciation of all other kinds of property which has been the consequence of the late revolution, land has preserved its value. We happened to pass through Lille at the end of last August, just after one of those foolish *émeutes* which the workmen got up to frighten the shopkeepers and master manufacturers, when rich people would take you into their houses and tell you they would sell you any thing you saw there for any thing you chose to give, at that very time it came to our knowledge that land was selling in the neighbourhood of that town for *forty years' purchase*. Nor can we quite agree with his lordship in the distinction which he appears to draw between the writer in a daily newspaper and any other journal appearing at intervals less frequent, even though it be a quarterly journal. It is quite true that in the latter there is time for more preparation, and the production should be better, but there may be, and frequently is, great care bestowed on the materials of a weekly or even a daily newspaper. The event of the day is frequently the match to a train of previous thought and study. It has been our wish to elevate the character of the public journalist of all sorts, and of the writers in the daily newspaper before all others, as exercising, in fact, functions more important than all the rest. We have, in an early

<sup>1</sup> See an article in the "*Journal of Agriculture*" for October last, on large and small farms.

number<sup>1</sup>, endeavoured to lay down the true rule as to this, and we adhere to the opinion there expressed.

But these are minor matters. In almost all his main points we heartily agree with Lord Brougham, and every day's events, — and surely they come "thick and threefold," — confirm, in a remarkable manner, his lordship's conclusions. As to the very interesting question of the Franchise, the author makes the following remarks: —

"The great chapter of the Elective Franchise cannot be left untouched in this appeal to past experience, and it forms the third of my reflexions, respectfully and most amicably submitted to Germany and to France. I have freely confessed in the House of Lords, that the result of the late French elections has not been altogether in accordance with what I had always apprehended would be the consequences of Universal Suffrage. A smaller, a very much smaller, proportion of the deputies returned has been taken from the inferior and the uneducated classes than could possibly have been expected, especially when such wages as a pound per day were held out to tempt labouring men from their ordinary occupations. It must, however, be observed that but a small proportion of respectable proprietors have been returned, and that a very great body of political adventurers has been chosen. We are also to recollect that this election was made for a particular purpose, for one occasion only. Those returned were to be dismissed as soon as the Republican Constitution should be framed. It by no means follows that the inferior classes may not turn their thoughts towards the trade of deputy, when repeated elections have brought the matter fully before them; and when they perceive that a poor man once returned, is sure to gain by a couple of years attendance a much larger fortune than he could hope to realise by a long lifetime of daily labour.

"Of one thing I am quite certain; this experiment of Universal Suffrage, even were it to succeed on a full trial in a country like France, long accustomed to elective proceedings, never can be safely tried by the German States; and it is most unwise in them to have begun their electoral course by adopting it as their rule. They ought to recollect that it is quite new even in France. The most popular of all the assemblies, the one chosen by the most extended franchise, was the Convention of 1792; and the qualification for electing a member of the primary body, was the payment of about three shillings in direct taxes, indicating an income of

<sup>1</sup> See art. on "the Press and the Bar," 3 L. R., p. 27. *et seq.*

forty shillings a year, while the members of that primary body, who really elected the deputies to the Convention, were to be such as paid eleven or twelve pounds, indicating an income of a hundred and fifty. This was indeed anything rather than Universal Suffrage; it was an extremely restricted franchise. The experiment of Universal Suffrage, then, in an old established country like France, has only been tried since last April. The Germans, in choosing their plan, had two examples before them; the Parliament of England, existing for eight centuries, and gradually improved, till it has been found, and is confessed by all reasonable men, to perform satisfactorily the functions of a popular representation; the Assembly of France, existing for not quite eight weeks, and of which no man can as yet venture to predict that it will be anything but a complete failure. These being the two patterns laid before the Germans, they, or rather their speculative, visionary leaders for them, have without hesitation preferred the French, backed by an experience of eight weeks, to the English resting its claim to approval upon the experience of eight hundred years." (Pp. 75—77.)

But the opinion as to the Suffrage is somewhat qualified in the Postscript —

"The peremptory opinion on Universal Suffrage expressed in the foregoing Letter, applies not to England so much as to countries unaccustomed to Elective Legislature. For I hold it to be very clear that we pitch our Franchise too high when we exclude the best and by far the most independent of all the lower orders, the Artizans. Without wishing to shew the least disrespect towards the middle classes, I am very sure that they are not more deserving, certainly are much less independent, than the good workmen. Indeed, I never saw any want of that quality so essential in a voter, independence, among any class of our working people, whether engaged in town or country labour. I feel confident, too, that with us the most extended suffrage never could produce such returns as have been made in Germany."

This book would be sufficient to make or establish the reputation of any other writer. As it is, it is merely one of the productions which the fertile genius of its author throws off without effort. It is dated from "Brougham," and it proves, if proof were necessary, that the author's return to his paternal acres endues their owner with all his pristine vigour, and that his few weeks of repose have been devoted to the lasting benefit of mankind.

## PROCEEDINGS OF THE SOCIETY

FOR

## PROMOTING THE AMENDMENT OF THE LAW.

[Continued from 8 L. R. 225.]

[Permission has been obtained to insert the Proceedings and a selection of the Reports of the Society for Promoting the Amendment of the Law, but the Society is not otherwise responsible for the contents of this Review.]

**GENERAL MEETING, MARCH 8. 1848.**—**M. D. HILL, Esq., Q. C.,** in the Chair.

The Minutes of the last Meeting (the 23rd of February last) were read and confirmed.

The Second Part of the Report of the Committee on the Law of Property on the following reference was considered: "To consider the propriety of amending the Law of Landlord and Tenant, with respect to fixtures and permanent improvements."

It was agreed that the Report should be further considered at the next meeting.

**GENERAL MEETING, MARCH 22. 1848.**—**M. D. HILL, Esq., Q. C.,** in the Chair.

The Minutes of the last Meeting (the 8th inst.) were read and confirmed. The following Members were balloted for and elected: George Cottam, Esq., as representing the Firm of Cottam and Hallen, Oxford Street; Francis Thomas Bircham, Esq., Solicitor, 15. Bedford Row; Frederick Hill, Esq., Inspector of Prisons, Belle Vue House, Hampstead; and Hugh Innes Cameron, Esq., 10. New Palace Yard, Westminster.

The reception of the Second Part of the Report of the Committee on the Law of Property on the following reference being moved: "To consider the propriety of amending the law of Landlord and Tenant, with respect to fixtures and permanent improvements,"

The Resolutions on Tenant Right (printed 8 L. R. 121.), of which notice was given in the Committee, were agreed to.

**GENERAL MEETING, APRIL 19. 1848.**—**Mr. Commissioner FONBLANQUE** in the Chair.

The Minutes of the last Meeting (the 22nd March last) were read

and confirmed. James Heywood, Esq., M.P., was balloted for and elected.

The following Resolutions on the reference as to the Law of Divorce, directed by the Committee on Ecclesiastical Law to be submitted to the Society, were considered.

1. The Court of Chancery to grant divorces *a vinculo matrimonii*, in cases of adultery.

2. The proceeding to be by bill and answer, and upon evidence in the ordinary course of the Court.

3. All bills of divorce to have affidavits annexed, negating collusion; and no decree of divorce to be pronounced upon confession alone.

4. The Court of Chancery to have power to direct issues or actions to be tried at law.

5. An appeal to lie as in an ordinary Chancery suit.

It was agreed that the Resolutions should be further considered at the next Meeting.

A communication respecting the treatment of lunatics was read, and it was agreed that the following reference should be made to the Committee on Equity: "To consider the state of the law respecting the confinement of persons alleged to be Lunatics."

Adjourned till Monday, the 8th day of May next, at eight o'clock in the evening precisely.

GENERAL MEETING, MAY 8. 1848.—The Right Hon. Lord BROUGHAM in the chair.

The Minutes of the last Meeting (the 19th of April last) were read and confirmed.

The Resolutions on the reference as to the Law of Divorce, were further considered.

Adjourned till Monday, the 22nd inst., at eight o'clock in the evening precisely.

GENERAL MEETING, MAY 22. 1848.—Mr. Serjeant D'O'LY in the Chair.

The Minutes of the last Meeting (the 8th inst.) were read and confirmed.

The following Members were balloted for and elected:—Robert Hunter, Esq., Advocate, 67, Northumberland Street, Edinburgh; Alfred Wyatt, Esq., Barrister, Middle Temple.

It was agreed that the Resolutions on Divorce should be referred back to the Committee to make such report thereon as they might think fit.

The Report of the Committee on Common Law on the following references was presented.

1. To consider the propriety of amending the proceedings in Actions for Debts in the Superior Courts proposed by the bill brought into Parliament in 1844, by Mr. Jervis.

2. To consider whether any other of the amendments proposed by the same bill, or any others in connection with the objects of that bill, might not be advantageously adopted.

3. To consider the propriety of reviving the Action of Account for the purpose of facilitating the investigation of accounts in Courts of Common Law, particularly in the cases of partners and agents.

It was agreed that the Report should be printed and further considered at the next Meeting.

Adjourned till Monday the 5th of June, at eight o'clock in the evening precisely.

GENERAL MEETING, JUNE 5. 1848. — The Right Hon. the  
EARL OF DEVON in the Chair.

The Minutes of the last Meeting (the 22nd of May last), were read and confirmed.

The following Members were balloted for and elected:—Henry Drummond, Esq., M.P., Albury Park, Guildford, Surrey; Tom Taylor, Esq., Barrister, 10, Crown Office Row, Temple; and M. Fortescue, Esq., Barrister, 2, Elm Court, Temple.

The Report of the Committee on Common Law on the references above given, was considered.

It was agreed that the Report should be further considered at the next meeting.

Adjourned till Monday, the 26th inst., at eight o'clock in the evening precisely.

ANNUAL MEETING, JUNE 21. 1848. — Mr. Commissioner  
FONBLANQUE in the Chair.

The Report of the Council, as to the state and progress of the Society, was adopted, and ordered to be printed and circulated among the members.

The accounts of the Committee of Management were presented and approved of.

The following officers were balloted for and elected for the ensuing year:—

*President* — Lord Brougham.

*Vice-Presidents* — The Lord Chancellor; the Duke of Richmond,



K. G. ; the Duke of Cleveland, K. G. ; the Earl of Devon ; the Earl of Radnor ; the Lord Nugent, M. P. ; Lord Campbell ; Rt. Hon. Stephen Lushington, D. C. L.

*Committee of Management* — Wm. Ewart, Esq., M. P. ; Mr. Commissioner Fonblanque ; Mr. Commissioner Fane ; E. Vansittart Neale, Esq. ; J. Pitt Taylor, Esq.

*Treasurer* — James Stewart, Esq.

*Hon. Secretaries* — Wm. Vizard, Esq. ; Arthur Symonds, Esq.,  
*Librarian.*

GENERAL MEETING, JUNE 26. 1848. — Mr. Commissioner  
FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 5th inst.) were read and confirmed.

The following Members were balloted for and elected : — Col. Clifford, M. P., 11, Chester Street, Grosvenor Place ; George Clive, Esq., County Court Judge, Southwark, Oxford and Cambridge Club ; Charles Neate, Esq., Barrister, Oriel College, Oxford ; and Edmund Boyle Church, Esq., Solicitor, 23, Southampton Buildings, Chancery Lane.

The Report of the Committee on Common Law on the references above given, was further considered :

Was received. And it was agreed that this Society, while it receives the present Report, is of opinion that the consideration of the proposed amendments in actions for debt should be accompanied by a more extensive enquiry into the mode of proceeding in such actions, and the effect of a judgment for debt.

Adjourned till Monday, the 10th inst., at eight o'clock in the evening precisely.

GENERAL MEETING, JULY 10. 1848. — Mr. Commissioner  
FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 26th of June last), were read and confirmed.

R. Shelton Mackenzie, Esq., D. C. L., 73, Albert Street, Morningside Road, was balloted for and elected.

The Report of the Committee on Ecclesiastical Law on the following reference was presented : — “To consider and report upon the Law of Divorce.”

It was agreed that the Report should be printed and further considered at the next meeting.

The Report of the Committee on Common Law on the following reference was presented : — “Whether parties to the record,

both at Law and Equity, should not be competent witnesses in their own favour, and liable to compulsory examination at the instance of their opponents."

It was agreed that the Report should be printed and further considered at the next meeting.

The following reference was made to the Committee on Common Law:—"Whether it be expedient to alter the law requiring unanimity in juries."

Adjourned till Monday, the 24th inst., at eight o'clock in the evening precisely.

GENERAL MEETING, JULY 24. 1848.—JAMES STEWART, Esq.,  
in the Chair.

The Minutes of the last Meeting (the 10th inst.) were read and confirmed.

The Report of the Committee on Ecclesiastical Law on the following reference: "To consider and report upon the Law of Divorce:" was received.

The Report of the Committee on Common Law on the following reference: "Whether Parties to the Record, both at Law and Equity, should not be competent Witnesses in their own favour, and liable to compulsory Examination at the Instance of their Opponents:" was received.

Adjourned till Monday, the 6th day of November next, at eight o'clock in the evening precisely.

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## POSTSCRIPT.

WHEN about four years ago we first ventured to solicit the attention of our readers on the subject of the general amendment of the law, and its administration, how faint a tone we felt ourselves obliged to take, how unsettled and indefinite were our own views on many points,—how cautiously we felt it our duty to proceed, lest we should shock their prejudices, and, perhaps, injure the cause we wished to serve. And now, after this short space of time has elapsed, how very different a feeling exists in our minds, not only as to particular portions of the subject which have been developed in a remarkable manner, but on the whole. Let the "candid reader" review in his own mind (not to mention many minor matters) the present state of many of the great questions connected with law reform, and he will see how different is the position they have taken within a very recent period of time.

1. CONVEYANCING REFORM. — Evils generally admitted by both houses of parliament. Registration and Conveyancing Commission appointed February 1827. Report now expected, and supposed to be nearly ready.

2. CHANCERY REFORM. — Evils generally admitted by both Houses of Par-

liament. First step taken, 11 & 12 Vict. c. 45. (England); 11 & 12 Vict. c. 48. (Ireland).

3. COMMON LAW REFORM.—Evils universally admitted. Local Courts successfully established, 1847. 9 & 10 Vict. c. 95.

4. DIGEST OF THE LAW.—Evils of present system of declaring law generally admitted. Principle agreed to Committee of House of Lords, 1848.

5. LEGAL EDUCATION REFORM.—Evils universally admitted. Lectures established by all the Inns of Court, 1847 and 1848.

Now we have here alluded to enough to show that the whole face of the law is not only about to be changed, but is changing so rapidly that it is difficult to keep pace with the alteration. Having got our reader to a point in which he will not much differ from us, we are disposed to ask him, how is it that this is so? And here, after the approved practice of some of our contemporaries, we might say, "See the results of the establishment of the Law Review. Have not we advocated all these changes, and lo! they have all come to pass!" But as we do not think our readers would altogether agree with this view, our native modesty requires that we should disclaim these mighty effects of our labour. As the faithful servants of all who will assist, and the chroniclers of all that relates to, law reform, and more especially these particular portions of it, we may have been of some service; as enjoying the confidence of many of the High Priests who minister at the altar of legal improvement, we may have been sometimes called in to consult as to certain measures; as standing from years and labour somewhat higher up the hill, we may have caught at an earlier moment than others the first dawn of certain truths; to this extent we claim, and have received our reward—the spread of sound knowledge on this subject,—but further than this we make no pretensions. To say more would be to confound effects with causes. The cause lies far deeper. The great advance of law reform arises from the universal desire of improvement and progress which is manifesting itself all over the civilised world at this moment, often mistaken in its efforts, but still striving onwards. In our own country we have happily not to construct constitutions or settle the first principles of government, but we are desirous of improving our social institutions; and thus it is that our laws and their administration are now beginning to receive that attention which their vast importance demands. And how wisely; for grant that organic reforms of the most sweeping nature were obtained (and we are by no means adverse to their fair consideration), what could they afford us but cheap and esteemed justice? Thus it is that all parties have wisely agreed to promote the amendment of the law, and to assist all due and considerate inquiries with the view of obtaining it. If we required any further proof of this, we should find it in two classes of facts. *First*, in the great attention now paid to the subject by the daily and weekly press. It is now one of the greatest recommendations to a newspaper to be well informed on questions of legal reform, which simply proves that the public properly appreciate and seek information of this nature; and this is sufficient to insure its being adequately attended to: and *next*, in the interest felt in the matter at the present moment in our vast colonial empire. These dependencies sympathise with the mother country in her prosperity and adversity, in her wants and wishes, and in them opinions find more easy and expressive vent than at home. In India, in Australia, in Canada, in Jamaica, "they call us to deliver." In these great settlements the governors now find in recommendations of legal reform the safest and most popular topics for public speeches and docu-

ments. We have already, in this number, made some allusions to what is now taking place in New South Wales. (See Art. VI.) But pretty much the same story is told whatever colonial newspaper is taken up. Thus we find Sir Charles Grey, at the opening of the present session in Jamaica, recommending "an arrangement of the written laws of the island, and the improvement of the practice of the Courts, and of the whole process by which the laws are carried into execution;" while in Canada bills are announced by the Government for removing feudal restrictions and simplifying the administration of the Law Courts.

Under these circumstances, although we have neither the right nor the disposition to complain of Her Majesty's present advisers as to any lukewarmness in this matter, yet we would willingly see some department in the state especially charged with the various relations as to *Justice*. If the expense of such a department is to be considered, let us remark, that the expenses of commissions of inquiry since 1830, as appears by a recent return to the House of Commons, have amounted to 648,272*l.*, a large proportion of which are inquiries into the state of our law; and that if there were such a department, all similar inquiries (which are likely rather to increase than diminish) would be conducted by it, and a great saving of time and expense, we are persuaded, would be effected.

We are much pleased to find that the views as to Law Lectures in our last Number (Vol. VII. p. 379.) met with the approbation of one of the learned lecturers, as appears by the following letter, which we gladly print, as in our opinion highly honourable to him. It was addressed to one of the supposed conductors of this Review, and has been communicated to us by him:—

"Lincoln's Inn, Aug. 8. 1843.

"My dear Sir,

"I write to let you know, that I so fully coincide in the views expressed in the Article concerning the meaning and design of Law Lectures, that, having just concluded my year's course, I have given out, that when we re-commence in November, the arrangements for admission to the Lectures at Gray's Inn will be these:—The admission will be by ticket (as before), and this ticket may be obtained, either from the Lecturer's clerk, at his chambers, or from the steward's offices, Gray's Inn, by *any* barrister, and by *any* student member of an Inn of Court, *without fee*; the ticket to last during the *whole year's course*. The small fee imposed upon admission to the lectures, has always been a secondary matter, in my estimation, and some time since I formed the design which now I have promulgated to the effect above stated.

"If in your November Number you can find a corner for the information above given, perhaps it will be satisfactory, as showing (to say the least) that your Article was not wrong in anticipating that the *Lecturers* would not be hostile to more liberal and comprehensive plans for the efficiency of their exertions.

"Believe me, my dear Sir,

"Very truly yours,

"WILLIAM D. LEWIS."

This Letter is written in the true spirit, and we are sure that great good will follow the course which Mr. Lewis proposes to take. While we are on this subject we hope we may be equally successful in another suggestion. It is, that the libraries of the Inns of Court should be opened at *nine* instead of *ten o'clock*,

and also in the evening. A great boon would be thus conferred both on the law student and on the practising barrister.

As in the days of chivalry, the gentle knights of those times wandered forth in search of adventure, and thus employed *their* vacations, so do our doughty champions of law amendment emulate their good deeds, and no sooner is the Court of Chancery closed and Parliament prorogued than forth do they sail:—

“ Full many countreyes they do overrunne,  
From the uprising to the setting sonne,  
And many hard adventures do atchieve,  
Of all the which they honour ever wonne;  
Seeking the weake oppressed to relieve,  
And to recover right for such as wrong did grieve.”

In this spirit Mr. M. D. Hill proceeded last autumn to Mettray; and as we learn from the Midland Counties Herald of the 26th of this month, in his charge to the Grand Jury at the Borough Sessions, he gave the following account of his mission:—

“ During the last month he had visited the reformatory institution of Mettray, near Tours, where there were 500 young offenders. It had been in action for nearly eight years, beginning with a small number, and gradually increasing. It had already sent out 400 youths, of whom the number reformed bore a very large proportion to the number unreformed. Like Stretton-upon-Dunsmore, it was an improving institution, and from the best judgment he could form, the present rate of reformation amounted to eighty-five per cent. This institution had its origin in 1839, and was due to the exertions of two French gentlemen, eminent by rank and social position, but far more eminent by their great talents, unwearied zeal, their large benevolence, and disinterested conduct in the circumstances to which he was about to call their attention. One of these gentlemen, (M. Demetz) he was proud to say, was a member of that profession to which he (the Recorder) belonged, and twenty years of honourable exertion placed him on the Bench. He was joined by M. le Marquis de Bretegnolles de Courteilles, who had served in the army with great distinction, and who being the possessor of land near Tours, made a grant of it for the purposes of the institution. They formed a plan, and laid it before their countrymen. The consequence was that they obtained large subscriptions, one gentleman subscribing sums at times amounting in the whole to 12,000*l.*; and they obtained aid from the general revenue, and also from that of the local departments. Having thus obtained the means, they felt it necessary to train assistants. They were too wise to begin work before they had their tools ready. They, therefore, founded a school for the training of intelligent, well-disposed youths, and so judiciously had the selection been made that a finer body of young men he (the Recorder) had never seen, nor had he ever passed more interesting hours than he passed with these young men in becoming acquainted with the details of the institution. The next step was to provide buildings. One principle of the establishment was that the youths, or, in other words, their wards, should be separated into families, as they were called. They erected several houses—simple structures without any ornament whatever—in which a strict economy was observed. The ground floor was used as workshops; the upper rooms by the family, which consisted of forty wards, at the head of which was a steady, intelligent man, carefully chosen, who was called the father of the family, and was generally acquainted with some trade. Each family was divided into two

sections, and each chose one of themselves to preside, who was called an elder brother, and who was thereby entitled to certain privileges and advantages, which made the office one of emulation to reach. He (the Recorder) was informed by the superintendent, that he was often surprised at the good judgment the boys displayed in their selection. Having, then, made everything ready for the reception of the pupils, they resolved to begin carefully — not by taking a great mass at once, but by selecting from the various prisons of the country (which they had the permission of Government to do) hopeful and favourable children, in order that the experiment might be made under the most favourable circumstances. They went to various prisons, and some affecting incidents took place. The feeling excited in the minds of the youths by the substitution of kindness for severity, produced very hopeful effects. They were taken to Mettray, and there subjected to a discipline which, while it had the warmest benevolence for its origin, was tempered by the severest judgment. The object had been to make good men, not to give immediate pleasure to children. It was no part of the system to elevate these children, because they had committed crime, to a higher rank than that to which they were born. The greatest skill had been shown in making the children the agents of their own reformation. In accordance with these principles, their food, though ample, was of the plainest description, of a character precisely similar to that of the peasantry of the department of the Loire in which Mettray was placed. Care was also taken of their health, some of the youths being sometimes brought there to die. In France, as probably they were all aware, there were what were called Sisters of Charity, excellent persons who devoted themselves to assisting and comforting the distressed. The founders of this institution availed themselves of the services of nine of those persons, who had made the sick room their sitting room; and he found it an airy, cheerful apartment, overlooking the garden, every thing being in the greatest order; the convalescent walking about or making lint for the other patients in the Infirmary; others employed in various ways; and two, who were evidently suffering pain, were yet quiet and tranquil. The kitchen, too, was under the care of some of these excellent women. \* \* \* By far the greater number of these young persons were employed in agriculture; and, in fact, the whole of the hard labour of the institution was performed by boys who must be under the age of sixteen when admitted, and many of them not more than seven or eight. Others were engaged in trades, such as making wooden shoes, or leather shoes for Sundays, in making apparel, in constructing agricultural implements, and he observed cabinet and carpentry work going forward. It might be supposed that where there was so much labour there would be little time for education. That was certainly true, as the time allotted to instruction, much of which was devoted to religious matters, was about ten hours in the week; but the most, in the proper sense of the term education, was made of it. The religious instruction was in the hands of a Roman Catholic clergyman. Protestants, he believed, there were none. At what cost was this done? At Mettray, the cost of maintenance and superintendence (which was necessarily expensive, consequent on the number of officers, there being 500 youths, 120 officers), taking an average of the whole 500, gave the amount at 20*l.* per boy per annum; but this was materially lessened by their labour, so that the actual cost was not more than 12*l.* per youth per annum. Were they aware, he would ask, that at that moment the borough of

Birmingham was paying 20*l.* per head per annum for every one of its prisoners at Warwick; and that notwithstanding the benevolence and skill, both of which were great, in the conduct of that prison, the chances of a further advance into crime far outweighed the chances of reformation? But if it should be said that even 12*l.* was a large sum to pay for offenders who had been in hostility to the law, they would recollect that the fair comparison lay between those who were reformed and those who were not. A petition was presented to parliament by the magistrates of Liverpool, in 1846; and among other important facts it stated that fourteen cases of young offenders, fairly chosen, were taken, and that it was found that these fourteen persons had been many of them committed to prison a considerable number of times — none less than eight, one twenty-three times. Now, with regard to the cost, it would be found that the reformatory principle was cheaper, besides making good members of society; but that the other system was dearer, without improving the man. The cost of each of these fourteen youths, arising from trials, &c., was 63*l.* 8*s.* Not one of them was reformed. From a communication with which he had been favoured from M. Demetz, he had found that since the revolution there had been a change in the institution at Mettray. The Revolutionary Government had not, certainly, withdrawn their aid from the institution, but its funds were aided before the revolution, not only by the manufacture of articles for their own consumption, but for sale elsewhere; and but for the revolution, he was informed that there would have been a net income from that source alone of 1000*l.* But the government had been of opinion that such sales were an undue interference with the honest labourer."

October 28. 1848.

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We have received the following letter: —

"Walsall, Oct. 3. 1848.

"Sir,

"I always look out for the *Law Review*, which I read with pleasure and instruction. But I am desirous of stating to you that if it were possible to insert more articles of a *practical* nature, I think it would be more useful.

"I am, Sir,

"Yours respectfully,

"JOHN BOYLE."

We have taken the liberty of printing Mr. Boyle's letter, because, in the solitude of the long vacation, we had come to the same conclusion, that our work might be rendered less unworthy the acceptance of the profession if it were rendered a little more useful, and a little less speculative. We have therefore, in the present number, endeavoured to make some improvements in this respect; and we think we shall be able to make some others. We are not going to point out what we have done, or to say what we intend to do. Our readers must find out the one, and must trust us for the rest. We do wish to say, however, that we have not abandoned the "Adjudged Points," although they have been excluded in this number by other articles.

THE  
LAW REVIEW.

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ART. I — THE SUPREME COURTS IN INDIA.

*Papers laid before Parliament by the Indian Law Commission,  
1848.*

AMONG the many anomalies connected with our empire in the East, the existence, possibly, of the Supreme Courts is not the least remarkable. Erected, in the first instance, for the two-fold purpose of asserting the supremacy of the Crown, and of correcting the malpractices and peculations of the Company's servants in a distant and newly-acquired country, they present the singular aspect of Courts of Law planted down in the midst of a despotic government, but wholly independent of it.

The East India Company, succeeding to the government of the Great Mogul, necessarily inherited the despotic powers which have always belonged to powers in the East, and which apparently are inseparable from dominion in that sunny realm. Yet the servants of that Company who exercise this dominion, are themselves subject to the jealous enactments of the Common Law of England, and, according to a decision of Baron Parke in the Privy Council<sup>1</sup>, are liable to an action for trespass and false imprisonment for any one of those petty oversights in practice, which magistrates even in England, with an experienced clerk within hail, cannot fail occasionally to commit, and which sharp attornies are so fond of detecting.

Our readers are aware that the Supreme Courts exercise jurisdiction, and administer the law of England (with certain partial exceptions) to the inhabitants of the presidency towns

<sup>1</sup> *Calder v. Halket*, Moore's P. C. C.



of British India; that is to say, to a population of possibly two millions of the most wealthy, the most enlightened, and most influential of our fellow subjects in the East.<sup>1</sup> But another, and perhaps more important function of the Supreme Courts, is to take cognisance of every infraction of the law by servants of the Company, and Europeans generally, committed to the eastward of the Cape of Good Hope. The law administered by these tribunals comprises the whole *Corpus Juris Anglicani*, as they possess the several jurisdictions of Common Law and of Equity, of the Ecclesiastical and Admiralty Courts, and indeed, we believe, of every Court known to the Law of England. The judges, moreover, have not only to travel over a wider field of law than their brethren in England, but their faculties as practical men of the world are taxed to a far greater extent, being called upon to decide all civil questions without the assistance of a jury, or assessors, or Trinity House Masters, or any other breakwater by which responsibility may be averted, or a refuge for a vacillating mind obtained.

It may be added to this brief sketch, that the above extensive jurisdiction is exercised almost entirely without other check than such as the consciences of the learned functionaries at the head of the Courts afford; for the expenses of an appeal to the Privy Council are so great, as to have induced the necessity of a rule that no appeal shall lie to that tribunal when the subject matter in demand is under 1000*l.* in value.

It was impossible that a jurisdiction so comprehensive, and swaying such irresponsible power, could be exercised without exposing a considerable broadside to criticism. It is necessarily irksome to the satrap of a province, who holds larger administrative authority over millions of inhabitants than is possessed by any other functionary in the British Empire, to find himself amenable to the behests on a little piece of

<sup>1</sup> The population of Calcutta who come daily within what is called the Ditch, or the old line of defence which was excavated to keep off the Mahrattas, may be estimated at 1,000,000 souls. The population of Madras is set down at 600,000, of Bombay at 400,000; but no accurate census has ever been obtained of any of these capitals.

parchment called a Queen's writ. To all who are acquainted with the workings of our rule in the East, it is familiar that, although the Government is nominally despotic, it is in fact exceedingly impotent in carrying out its views, and is dependent, to an extent unknown in English administration, on the good will and pleasure of its subordinates in office. This impotence works for good as well as for evil. Disobedience to orders from Government — disobedience protracted, wilful, and avowed — has won for us the greater portion of our empire in India; and in very many cases, local information, and the circumstances which arise at the moment, make the best devised scheme, which has been pre-arranged at a distance, impracticable. The Court of Directors, on whom the principal portion of the details of administrative government devolves, are perfectly aware of this vice inherent in their councils, and therefore are always willing to listen to well-founded objections to their orders. But the willingness to listen to well-founded objections imposes the obligation of listening to objections generally; of weighing them carefully; of decision — a process which, when the parties in communication are many thousand miles asunder, necessarily occupies many months, and frequently years, before a conclusion can be arrived at. The obvious result is, that Government servants are enabled to treat the orders of the Home authorities with a nonchalance and indifference which the executive officers of a European government would not dare to display. With respect to the orders of the local governments, of whom the same deficiency of local information cannot in general be predicated, a different class of agencies comes into play, by which a stout-hearted administrator, either strong in his own ability, or attached to his own views, and fond of power, is enabled to secure himself from being diverted from his self-chosen path. The Government of India is such a complicated machine — a portion of the power residing with the local governments, a portion with the Government of India, a portion with the Court of Directors, and a portion with the Board of Control, with a power of interposing at any time, and in any direction, on the part of the Imperial Legislature — that it is

impossible to say, at any one moment, where the actual power for the particular emergency resides, or by whom it will be exercised.

But the inhabitants of the East, from time immemorial, have been always most ingenious in applying themselves to detect the different springs by which Government action is determined; and having made the discovery, they leave no stone unturned to put the forces in counter-action to one another, so as to guide the movement in their own favour.

Suppose now some unpalatable order emanates from the local government to any particular department of the service: for some months the command may be disregarded altogether, the pressure of business in most offices being such as to make an excuse on this ground irrefragable. But if the order is reiterated over and over again, the wits and ingenuity of the subordinates in the department are put in requisition; and Brahmin subtlety and talent are much overlauded if they do not suffice on most occasions to bring forward a weighty and plausible list of objections to the measure in question. The head of the office, himself probably an able and experienced man, now reduces the cramming he has received into writing, and an interminable minute is paragraphed, which is forwarded to head-quarters. Here commences the process in what may be called the secretary's mill; for the paper in question undergoes a searching investigation in each department and subdepartment of the secretariate, till at last it emerges with a minute upon its back by the secretary himself, in a form ready for being laid before the Governor and Members of Council. Each of these functionaries makes his remarks in writing upon the matter before him, and as a considerable degree of ability is ordinarily called forth and available on these occasions, and as all public questions have two sides to them, the chances are, that the provincial collector and his Brahmin clerks have succeeded in bringing forward sufficient plausibilities to stagger the government, or to gain over one or more of the members of council, and the question remains there, shelved. But even if the government is firm in their previous resolutions, it is a matter almost of course to obtain a reference to the Supreme Government and the

Court of Directors, and thus years elapse before the question is ripe for decision. In the mean time the recalcitrant pro-consul pursues his course, unchecked, laughing in his sleeve, or rather laughing openly, at the feebleness of the powers above him; and if, eventually, orders should issue from the home authorities hostile to his own views, the probability is that the subject is then forgotten, or that his own post has been changed, or that he himself may be a member of the local government by whom the alteration is to be effected. Nor does it even follow as a matter of course that, if the views of the local government are palpably right, they will be enforced by the home authorities. We think we have observed something like a pettyness occasionally displayed on the part of the Court of Directors in their tendency to snub the Indian governments. The style of address adopted by the Colonial Office to governors of crown colonies bears a most remarkable distinction in its courtliness and deferential language to that in use in Leadenhall Street. The Court has never got over the peremptory tone of command which a mercantile firm adopts to its factors and agents; and if the Company might possibly with justice complain of the open disregard which Lord Ellenborough evinced for their orders, the latter could not help contrasting unfavourably the absolute and "High Mightiness" tone of address of a body of men, whose names were scarcely known to him, and whose weight in public estimation was null, with the high-bred diplomatic despatches of the statesmen at the head of public offices in England. This propensity to remind the local governments that they are the subordinates to the Court of Directors is, however, but another manifestation of that which every page of history assures us of — the love of power in man. But a triumph for local officers in disputes with the local governments is often obtained from sources even still more questionable. An influential member of the Court of Directors may be a brother, or an old fellow-civilian, or an intimate friend, of the appellant subordinate; and in such cases an opportunity is obtained for communicating views and impressions by private correspondence, which no one

who is acquainted with India will dispute most often succeeds in swaying the decision of the Court.

The above digression serves to indicate the truth of the remark we made above as to the feebleness of the Indian government, and of the powers *de facto* to carry out their own will which officials in the East possess.

It is obvious that the mandates of the Common Law, so peremptory in their demands, so little respectful of persons, can be but distasteful to the potentates whom we have shown to be so independent of their immediate masters. It may be said, indeed, of all of European race in India, that the circumstances in which they are placed tend very much to engender the spirit and sentiments of an *aristocratic du place*; and we feel little doubt that it is the esoteric doctrine of many a young officer, that an institution which forbids him from "walloping a nigger," acts very unwarrantably, and that it is sheer pedantry to treat Hindus like Englishmen, as equal before the law.

But dislike to the Supreme Court has not been confined to these quarters. The establishment has always operated as a check upon the East India Company and the local governments. The Honourable Court, who are fond, from habit and old mercantile traditions, of overhauling every detail, have nothing whatever to do with her Majesty's judges, except to perform the unpleasant operation of paying them large sums for outfit, salary, and pension; and although at the present time it is not probable that any leading member of the Court of Directors would advocate openly the abolition of the Supreme Court, yet it is easy to discover, from the tone of their advocates, that they would gladly see its place supplied by a court of their own.

James Mill also, in his instructive and, on the whole, philosophic work on India, has contributed not a little to put the position of the Supreme Court in a false light. Inheriting from his master, Bentham, a dislike to English lawyers, the passion, which, in the philosopher of Queen's Square, is for the most part comical or harmlessly exaggerated, assumes, in the temperament of Mr. Mill, a more exacerbad and bitter form. And thus an inquirer into the dissensions between

the Supreme Court and the Government at Calcutta in the days of Hastings and Impey, who shall only draw his information from the pages of Mill, will obtain but imperfect notions of the merits of the controversy.

Lastly, the press of India, so far as we are enabled to judge from the specimens which have come before us, is, for the most part, unfavourable to the Supreme Court. In all colonies an attack upon the Judges is one of the surest routes to popularity. For, in money-getting, bustling communities, where no politics exist to engross, or arts to refine, the mind, decisions upon *meum* and *tuum* — upon all the little controversies of individuals — become points of absorbing interest to the society. Upon such questions every one feels himself competent to decide; for “sound judgment,” “common sense,” the “principles of reason,” are tribunals to which every one can appeal with success, and on which no common man, certainly no editor of a colonial print, ever doubts his power to lay down the law with infallibility. “*Tout le monde se plaint de sa mémoire, personne de son jugement,*” says aptly a French maxim.

It savours, besides, of independence, to beard the functionary who has the lives, properties, and characters of the community in his hands. It is a service, also, of apparent courage, but without danger; for the English law has wisely and liberally decided that the judgments of its magistrates are open to the freest discussion, and to what the Lord Chief Baron lately termed “licentious comments.” But these stimulants to judicial abuse which exist in most colonies are aggravated in India by the peculiar class of newspaper readers. As a newspaper in the present day is ordinarily a matter of trade, it may be safely predicated that the opinions it propounds are such as propitiate the majority of its readers. But in India readers of newspapers belong almost exclusively to the service, or are, in some way or other, dependent on government; and we have already shown that the ministering of the Supreme Court can never be made what the Italians expressively call *sinpatico* to the local government and their fellow-servants. Another remark should also be made to serve for those who would provide themselves with

a key to understand the Indian press. The local governments having in their disposition nearly all the patronage to local appointments, have usually been enabled to secure one or more of the ablest newspapers at each presidency in their interest; and it is curious enough to observe that while these journals affect sturdy independence in their censures of the Queen's Courts, of the Board of Control, and even of the Court of Directors, none of whom have any patronage to bestow for which journalists are available, the local governments for the time are always the objects of unmeasured praise.

- Thus the only two considerable bodies in India — British merchants and the natives at large — whose interests at all times demand the existence of an independent law tribunal are, the one too few in number, the other too impotent, to obtain a steady advocacy, through the press, of their rights and privileges.

Notwithstanding all these sources from which hostile criticism have been poured forth against the Supreme Court, and that no one has been found to draw a sword in its favour, the institution may be pronounced to have proved eminently successful; and although the sentiments we have alluded to may prevail amongst the youthful and unthinking in the service, or amongst the out-and-out partisans of the Company, we question whether there is a single statesman deserving of the name who does not recognise its utility.

It is now seventy-five years ago since the Supreme Court was first established in Calcutta, and English law applied to a large population of natives. During all that period, with the single exception of Sir Elijah Impey (into the merits of which discussion we do not now intend to enter), there is not one case of moral imputation which has been brought against a judge. We do not mean merely no charges of corruption or impropriety, but, so far as we can recollect, the Bench of India, during that period, has displayed the same good sense, self-government, and dignified deportment in the exercise of their functions, with as few occasional exceptions, as the much esteemed Bench of England during the same period. The colonial annals, we fear, will not present an equally favourable picture of judicial discretion.

The opinions which we are expressing are evidently those which have operated upon Government; for we find the institution of the Supreme Court gradually extending itself to other parts of India, namely, to Madras in 1800, to Bombay in 1824.

Now, the causes which first of all called for the erection of a royal court in India are no longer in existence, or at least certainly not to the same extent as in 1773. The charter acts of 1813 and 1833 have removed any shadow of doubt as to the sovereignty of the Crown over the realms won by the servants of a trading company; and the extortions and tyranny which were practised by European officials with impunity at the commencement of our rule, when the most inadequate salaries were given, when no free press or overland communication existed, and when public virtue undoubtedly was not measured by so high a standard as at the present day,—these evils would not be likely again to raise their heads, even if the Supreme Court were abolished. It is obvious, therefore, that other motives have operated to cause the extension of the Supreme Court, and to produce the general impression which we affirm to exist amongst the ablest men connected with India, that the Supreme Court is a necessary portion of the Government, so long as the charter is continued to the Company, and that the interference of the government of the Crown is only indirect.

To us as lawyers there is no difficulty in explaining the phenomenon. The English, above every other nation in Europe, are noted for their respect to the law, for their detestation of acts of arbitrary will. The publicity which has attended our courts of justice from time immemorial, and the share which the people have always taken in the administration of justice, are distinguishing features in our history, and have co-operated mainly to the formation of our national character. One of the results is a general diffusion of the elementary principles of law throughout the community, and a capacity to appreciate the ordinary qualifications which are required on the Bench.

But the system of the East India Company is wholly inefficient to produce well-qualified judges, and the deficiency



becomes more apparent the more that British enterprise and capital are attracted into India, and the more that our fellow-Hindoo subjects imbibe the principles by which a constitutional government is directed.

No one is less disposed than ourselves to disparage the qualifications of the East India Company's servants. As administrators, diplomatists, and soldiers, they may vie with any service in the world. The situations of responsibility into which they are thrown at an early period of life, the practical education by which they are called upon to act on occasions of emergency and at the spur of the moment, and the close intercourse into which they are thrown with large and varied groups of mankind, constitute admirable training to form the ready, the practical man, but are eminently unfit to engender the deliberative and cautious frame of mind, and deferential respect for the opinions of others under similar circumstances, which befit a judge. A civilian in India is in truth more of a soldier than a patient student. He should ever be booted and spurred ready for a gallop of thirty miles before breakfast to quell a dissension, or to shoot a tiger, or to summon the refractory killidar of a fort. Leaving England at the early age of eighteen, with no more knowledge of law than a boy's perusal of Blackstone, and the unwilling audience of a course of lectures at Haylebury can bestow, his time is too much occupied, when he arrives in India, with the study of man and the institutions around him, to allow him to pay any attention to the recorded wisdom of ages on the various knotty questions of jurisprudence.

This incapacity of Indian civilians for judicial employment is so apparent amongst themselves, that the line has always been a despised one with the service. A considerable latitude of choice among the different departments being allowed, it is rare that any government who is desirous to elevate the judicial branch can succeed in inducing young men of promise to enter it. Indeed, it is a common saying in India, when a man is found unfit for the more stirring branches of the service, "that he'll do to make a judge of."

The evil we are speaking of, moreover, is increasing day by day. In the first place, the Indian empire is gradually

becoming subjected to the dominion of law; and whether in the shape of a well adjusted code, as the legislature seems to have contemplated, or in regulations framed for the nonce by the government of India, it is certain that a considerable body of written law is growing up which demands systematic exposition. On the other hand, the large and increasing employment of native agency in judicial functions, is gradually taking away from European employ  s the only opportunity they had of obtaining judicial experience. All over India, we believe, the trial of causes in the first instance is attributed to native judges, and the English Mofussil judge, after ten or twenty years' service, commences his functions at once as a Judge of Appeal, with no more experience in legal controversies than a junior lord of the Treasury or a commissioner in the Custom House would have with us. The evil results of this want of previous training are said to be very palpable, and the general feeling we are assured throughout India, with respect to the law tribunals of the Company, is most unsatisfactory. The native judges are not believed to be trustworthy, nor until their salaries are sufficiently large to place them on a higher social eminence<sup>1</sup>, can they be expected to do so, and their English superiors are incompetent to detect their malpractices. It necessarily follows where ingenious roguery fills the subordinate positions, and incapacity sits at the helm, that the good ship Justice is often steered into troubled waters, and much barratry among the crew, we fear, takes place.

In juxtaposition to these tribunals of the Company, the Supreme Court presents an aspect to the observing public in exact conformity with courts of justice in England. Presided over by professional judges, and attended by an able and independent bar, there is exactly the same certainty amongst suitors that an independent judgment will be ob-

<sup>1</sup> The Moonsiffs, or lowest class of native judges, have jurisdiction over causes to the amount of 500*l.*, but their salaries are only 180*l.* a year. It may be imagined that salaries of this amount are not very likely to put a stop to the notorious malversation which has prevailed in the judgment-seat in the East from time immemorial; and amongst the natives the belief, we understand, is universal that the Moonsiffs and Sudr Amins are corrupt.

tained in every case, unbiassed by authority or unswayed by subordinate influences, as exists in the mind of the public with regard to Westminster Hall. And to a country like India, which, as we have before shown, is necessarily governed despotically, but as to which the genius of the English constitution makes it imperative on its rulers to introduce as much liberality in government as the country can bear, we cannot but look on the introduction of the body of men composing, and connected with, the Supreme Court, as a great advantage to the community. These gentlemen, unlike the members of the Company's service, go out to India at mature periods of life, when their opinions are formed and education is finished. They bring with them the prevailing doctrines in England on all the great questions of morals and government, and which possibly are of a later growth by a generation than those which are accepted amongst the men in highest place in India; and, moreover, they go out wholly untinged by the stains which the exercise of despotic power so frequently leaves behind. If it be true that the studies and habits of the bar are apt to confer a conservative bias on the mind, it may be observed that such a disposition is not unfavourable in a country constituted like India; for the most confirmed ultra tory in England will find ample demands upon him in our Oriental Empire to impinge on his favourite doctrine, *ne quieta movere*, and it is well that he should not attempt to accelerate the movement too hastily.

The attention which we have bestowed on the subject of the Supreme Courts of India, and which has called forth the preceding observations, has made us well acquainted with the objections usually urged against the institution, and we confess that considerable weight belongs to some of them.

The defects of the Supreme Court are the same as those of English law generally — the heavy expense of proceedings, and the intractable form of the Common Law, by which justice is so frequently sacrificed. But these evils are much enhanced in India. In the first place, India is a poorer country than England; the luxury therefore of litigation cannot so easily be indulged in. But the actual expenses of lawsuits are greater in India than in this country; shillings in England are, to

use a common expression, rupees (that is to say, double the amount) in India. A half guinea motion in Westminster Hall is remunerated with a gold mohur, or 1*l.* 10*s.*, in Calcutta. And this evil is, to a great degree, inseparable from the employment of a class of highly educated men in a foreign, distant, and unhealthy country; and as it runs through every department of European agency in the East, no improvement seems capable of being suggested. But in another and far more considerable branch of law expenditure great reductions are capable of being made by the interference of Government. All the officers of the Supreme Courts are remunerated by fees, or from the proceeds of a fee fund, and the judges of the several courts, to our knowledge, have been frequently restrained from introducing simplifications of procedure by their unwillingness to interfere with the existing rights of officers of the court, who have often sacrificed a lucrative practice to accept their appointments. If the argument is sound that the remuneration of judges should not be made to depend on the individual stages of a cause at which a fee can be exacted, exactly the same reasoning is applicable to officers of the courts; for undoubtedly the exaction of fees on their part leads to the same increase in the expenses of litigation, and to the difficulty of checking it, which we have before observed upon. On the other hand, if it be thought right that the expenses of law establishments should be borne chiefly by suitors, and not by the public at large, the provision adopted in the County Courts Act of exacting an institution fee seems capable of being made applicable to all our legal tribunals.] If the Government, then, would undertake the payment of all the necessary officers of the court, reimbursing themselves from the institution fee fund, and would leave to the judges the task of modifying the procedure of their courts, so as to reduce the expenses of litigation, and enable suitors to bring forward their cases in the simplest forms; we have little doubt but that vigorous and effective changes in our different courts might be introduced which would leave little to complain of.

The inflexible forms of common law, and the rigid rules of special pleading, undoubtedly operate very injuriously in

India, when they are applied to a state of society so different to what exists here. In England a long series of ages has accustomed us to decisions on mere form irrespective of merits, to special demurrers, to the distinctions between law and equity; and the special classes of agents who are required to work the system are produced by the demand. But the simple inhabitants of the East, when they approach a court of justice to have their cause decided, expect a decision on the merits, upon grounds they can understand and talk of in their respective caste meetings and market places. But if they learn from their legal adviser, at the close of a learned and lively decision in court, and after months of anxious and expensive preparation, that the cause is decided against them, because their pleader has failed to give colour, or because there is a variance between the pleadings and the proof, or because they ought to have addressed the Court on its equity side and not at common law, they go their way stupified and sorrowing, wholly unable to account, by the reasoning faculties God has given them, for the strange habits and manners of the conquering race, under whom for the nonce they are placed.

It is in these cases that the Mofussil judges contrast their decisions favourably with those of the Queen's Courts. If a native judge decides a cause unjustly, he does so always on the pretext that the ends of justice warrant his decision; and if a European judge confirms the decision on appeal, it is always because he is swayed by the cogency of the reasons alleged, or by the plausible arguments which the Sheristadar, or other native subordinate at his side, can suggest. But that pernicious maxim so popular with lawyers, *la forme emporte le fonds*, never, or but rarely, enters into the grounds of Mofussil decision.

We have already indicated the obvious course open to Government for reducing the expenses of litigation in our Indian tribunals, by awarding fixed salaries to the officers of the court, and thus enabling the judges to adopt any simplifications of procedure that may be thought advisable, without fear of injuring vested interests.

But the grand step which is required to make our English

courts of justice a blessing to the Indian community, and a model on which all provincial courts may be formed, is the adoption of a simple uniform code of procedure, by which every right that is sanctioned by the law of England may be enforced, and every wrong redressed. The division which exists in this country of courts of law and courts of equity, courts for sea causes and courts for land causes, courts spiritual and courts lay, with the different methods of practice in vogue in each, is familiar to our understandings, and long usage has accustomed us to its results. But the Hindus never can be made to understand the distinctions; and the expense, vexation, and, we must add, frequent injustice which they occasion, enable very plausible arguments to be brought by detractors of our rule against those claims to enlightenment and high civilisation, of which we declare ourselves the apostles in the East.

With the uniform system of procedure such as we have indicated, the English law is as easy to administer to the Hindus as their own; indeed, far easier, because it is more certain, and is contained in authentic records, which every man possessed of common education may become acquainted with.

The contrary of this proposition has been asserted, we are aware, with considerable dogmatism by Mill and his followers; but any accurate observer who is conversant with Indian history must be convinced that the historian has here indulged in a fallacy. The population within the Mahratta Ditch at Calcutta have had all their relations in life, save such as respect marriage and succession, regulated by English law since the year 1773; and during that period the Court has never found any difficulty in applying a rule appropriate to terminate each litigated question as it arose. But on every complicated case arising in the Mofussil courts during the same period, where the *responsa prudentum* are to be found locked up chiefly in manuscript Sanscrit commentaries, or in Pundits' bosoms, the conflict of authority which presents itself, and the inability of an unprofessional judge to refer to any legal stores of his own, must make, we conceive,

the task of decision the most painful imaginable to a conscientious mind.

The time, we are convinced, is not far distant, when the ends of justice will imperatively demand that professional men shall be appointed to preside over all the law tribunals of India. Whether this is to be effected by the administration of justice throughout British India, in the name of Her Majesty — as we conceive, on constitutional grounds, as well as on jurisprudential reasons, that it should be (and which was the plan proposed by the ablest statesman India has produced, Warren Hastings); or whether an amalgamation of the *Suder Adawlut* and the Supreme Court should take place, as the Law Commission have recommended; or whether the Company should select barristers of ability to fill the highest judicial posts in their courts — are questions that will, no doubt, be fully discussed when the renewal of the Company's charter is brought before Parliament. But it wholly clashes with the enlightened spirit of the nineteenth century, to entrust the courts of judicature, in a country under British dominion, to men who have no legal or professional education whatever — to Europeans who have failed as revenue officers or diplomatists, or to natives who are learned only in the arts of subserviency and mending pens.

In the papers which have been laid before Parliament by the Indian Law Commission, we observe that Sir Erskine Perry, chief justice of Bombay, and Mr. Cameron, late member of the Legislative Council of India, have steadily advocated some such views as we are now propounding, and appear to have kept in view, for some years past, the propriety of making the Supreme Courts more generally available to the Indian community than they have been; and we are glad to have their concurrence, when we point out a simplification of English procedure as the first essential step to be taken in this direction.

We have now before us a printed draft act, which was read a first time before the Legislative Council of India in January 1848, and which was understood to have emanated from Sir Erskine Perry, by which an experimental court was to be established in Bombay, with a jurisdiction up to

100*l.*, and by which every description of cause, whether at law or in equity, was to be brought forward by the same machinery, and was to be disposed of by a single judge of the Supreme Court, with an appeal to the full Bench. But it is understood that the Court of Directors have issued a peremptory ukase to the Government of India to abstain from any municipal legislation of this kind without their previous sanction; and the draft act has accordingly been left to slumber among the records of the India House, with Mr. Macaulay's Criminal Code, Mr. Cameron's able minute on a *lex loci*, and the admirable draft on criminal procedure, which we understand is chiefly attributable to Mr. Daniel Elliott, of the Civil Service of Madras.

We trust that the great advocates of Law Reform in the Legislature, and especially Lord Brougham, Lord Denman, and Lord Campbell, will turn their attention to this subject, and ascertain on what grounds the heads of the law in India have been thwarted in their endeavours to improve the institutions of the country. The question is, indeed, of more general importance than might at first sight appear. Every one easily recognises what a magnificent appanage India constitutes to the British empire. As an outlet for our manufactures to the innermost recesses of Asia (and every day's conquests are opening up new lines of communication), and as a road to employment, honours, and wealth for the middle classes of England, India affords resources which no other dependent province of an empire ever yet presented. But happily the improving tone of public morality has produced the general conviction that India is not to be governed solely for British interests, but that the welfare, prosperity, and improvement of the native community are to be consulted in every institution we introduce. But how the advance in civilisation is to be made in the torpid East, is the problem which our wisest statesmen and most ardent philanthropists have not yet been able to solve. The inflexible adhesion of orientals to their religion, the antisocial bonds of caste, and as much as either of these, perhaps, the haughty "morgue" of the English character, set up barriers between the Hindu and the British to intimate social intercourse, which prevent



any relations of affection arising between them. British dominion hitherto has been just, but depressing; and though the lower ranks are not now subject to lawless exactions, as in the time of the predatory Mahratta, the upper classes are sinking down to a low level of despondency; and no appliances are at hand to cheer them up. Missionary enterprise has hitherto wholly, and almost avowedly, failed in making any impression in the country. The efforts made by Government in education have been hitherto on too small a scale to produce any considerable effect.

There is but one common ground, in our apprehension, at the present moment, on which the British and Hindus can meet with satisfaction, and whereon the Government can always present itself as an enlightened benefactor to our hundred and twenty millions of fellow subjects in the East, contrasting themselves favourably with every previous government. This is in the administration of justice. The reasoning Hindu, with his finely-formed Caucasian skull, can well appreciate all our efforts in this behalf, and is ready, beyond almost any citizen in the world, to adapt himself to the positive rules laid down by authority, and conform to their behests. Too much divided among themselves, and for the most part too unwarlike to enable them to aspire to independent government, well educated natives must recognise that it is a lot not to be struggled against—a “*nusseel*” which they fully appreciate—to have a conquering race at their head, who will protect their frontier from the invader, and keep down internal dissensions; but if, at the same time, inflexible and incorrupt justice is administered to them in all their relations of life, and on grounds which they appreciate and admire—if the benefits of education are sufficiently extended to allow the best among them to fill the higher posts of the judicial bench, and an honourable sphere of ambition be opened up to them in civil employment generally, the conviction may, and probably will, become general, that the connection between Great Britain and Hindostan is the best, under all circumstances, which the nature of things will allow; and if a general liberal policy be pursued in the direction here indi-

cated, we may possibly promise to ourselves a happy continuance of the union to both countries for as long a period as any statesmen will choose, in these days of moral cataclysm, to contemplate in the womb of time.

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## ART. II. — ON CHANGE OF SURNAME.

THE change of name, either by the addition of another or the substitution of a new one, is often desirable, and sometimes a matter of moment. The more general occasion on which the alteration or substitution takes place is where a testator or settler, with a view to perpetuate his name, makes it a condition precedent, that those who enjoy his property shall bear his name, either as an appendage, or wholly in substitution for their own family name.

The other occasions on which a change of name is desired, though less rare, are often for innocent and proper reasons; sometimes for laudable purposes, and (as an abuse) sometimes for purposes of fraud. We conceive that a substitution or alteration of a name in sound or sense, may very properly be desired when the original name is of equivocal sound or sense; or of doubtful propriety in morals or decency; or as exposing its possessor to ridicule by its own peculiar merits, or as provocative of a disagreeable nickname. Although we have several instances as proofs, we find that we must leave the matter to the imagination or observation of our readers. As to the origin of such names, and whether the age which produced them can or cannot be charged with want of morality or good sense for attaching them, we leave to our antiquarian readers to determine, merely remarking, in mitigation of any unfavourable opinion which may be formed, that time, which changes most things, has an effect on names; and though not always by an actual variance in sound or spelling, yet very often, with a fearful change in sense and propriety; in other words, the sense has slid from its original meaning, which may have been harmless, to one which, by common

reputation, indicates something gross or ridiculous. "The names of men at this day are only sounds for distinction sake, though they perhaps originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them but to mark out the families or individuals we speak of, and to difference them from all others."<sup>1</sup>

Names (if not of the great family of ordinary ones) may also become notorious in an unpleasant degree by the acts and defaults of other proprietors of them, with whom a namesake may have no connexion in family or character. They may also become unpleasant by the influence of popular writers, who may perhaps select some unusual, but actual name, to represent a vile or ludicrous specimen of our species. We could select several; but our readers cannot fail to have done the same, and may, in addition, have experienced some annoyance from the circumstance. Of course we do not mean to say that a name which is harmless in sound and sense should be abandoned because of the titter of a day; but we bring the subject forward to show that the notoriety of previous namesakes, especially when likely to be remembered for one or two generations, may be a good reason for desiring to be relieved from the irritation consequent upon the name.

With regard to other motives for changing a name — those of a fraudulent nature — we have little to do; but from the cases in which the assumption of fresh names have come before the Courts, we hope to draw some valuable hints for the guidance of those whose motives for departing with the names of their ancestors are founded either on the necessity of a gift so conditioned, or out of respect to good sense and strict morality.

The family, or surname, and that received at baptism, seem relatively genus and species, and had, as appears from the old books, very different qualities. The surname appears to have been considered as susceptible of great pliancy, and could be altered or abandoned; whilst the Christian name, once given at the important ceremony of baptism, was unalterable,

<sup>1</sup> *Gilb. Hist. C. B.* 181. c. 17.

and could not be superseded. Thus Lord Coke (Co. Litt., 3a), speaking of alienations by deed, says, "regularly it is requisite that the purchaser be named by the name of baptism and his surname, and that special heed be taken to the name of *baptism*, for that a man cannot have two names of baptism, as he may have divers surnames."<sup>1</sup> The only change of Christian names permitted in those days was, perhaps, not inconsistent with that rule. It might be altered on the more important occasion of confirmation, as Lord Coke tells us was the case of Chief Justice Gawdie, whose name of baptism was Thomas, and his name of confirmation Francis; and which name of Francis, by the advice of all the judges, he did bear, and afterwards used in all his purchases and grants. We confess, however, not to perceive the agreement which Lord Coke does when he adds, "and this doth agree with our ancient books, where it is holden that a man may have divers [sur] names at divers times, but not divers Christian names." It would seem to us that the learned chief justice had had a diversity of names, to wit, Thomas for some years, and afterwards Francis.

In *Williams v. Bryant*<sup>2</sup>, when Gawdie's case was cited, Mr. Baron Parke observed, "Since the Reformation a party cannot take a second Christian name at confirmation. That could only be done in Roman Catholic times. In the reformed church, it is true, the bishop lays hands on the person to be confirmed, but he does not give him any additional name." Where an alteration was made by a plaintiff in his defendant's Christian name, a greater latitude was allowed, because the matter was one not so much within the plaintiff's knowledge, and the defendant might have concealed his name of baptism and been known by a different one. In such a case the defendant must plead that he was not only baptized but known by such name, for to say that he was baptized

<sup>1</sup> Christian names, though sounding plural, are in law only one name, thus, John Thomas Henry. An ignorance of this circumstance led an innkeeper to suppose that a traveller announced by a name of many parts, was a suite of persons, and to plead inability to lodge them. On a late royal Spanish baptism, the infant, we are told, received a name of twenty links.

<sup>2</sup> 7 Dowl. Prac. Cases, 506.

without saying "and known" is not sufficient.<sup>1</sup> It was sufficient, therefore, for a plaintiff to sue his defendant by such Christian name as reputation had given him, without troubling himself to ascertain whether it was really his name of baptism. This reputed Christian name was only regarded where the defendant was attempting to make a fraudulent use of his baptismal name; it did not, of course, follow that the name by which he could not object to be sued was one which he himself could adopt and use on his own behalf or enforce its adoption by others. To this reason may be referred the case of a man, baptized by one name and known by another, making a grant by his reputed name, and which was held good.<sup>2</sup> His grant, according to the general rule, was taken most strongly against himself. So in cases where a party attempted to alter, or by accident misstated, his own Christian name in any pleading where he was plaintiff, the defendant might plead it in abatement. "A defendant may plead misnomer of the plaintiff if his Christian name be mistaken, though he be known by the name by which he sues, for he can have but one name of baptism, and ought to sue by his true name, and not by the name by which he is known."<sup>3</sup>

The distinction between Christian and surname seems to have been disregarded in modern cases, and both description of names treated as being susceptible of change. In *Frankland v. Nicholson*<sup>4</sup>, which was a case before Sir William Scott, that learned Judge remarked, "There may be cases where names acquired by general use and habit may be taken by repute as the true Christian and surname of the parties;" and his Lordship decided, with reference to the Marriage Act, which required the true Christian and surname of the parties to be stated, that names acquired by such general use might supersede the use of the original name. In *Williams v. Bryant*, before referred to<sup>5</sup>, Mr. Baron Parke observed, "It is certain that a person may at this time sue or be sued,

<sup>1</sup> Com. Dig. Abat. F. 17.

<sup>2</sup> 2 Roll. 43.

<sup>3</sup> Com. Dig. Abat. E. 18.

<sup>4</sup> Reported in a note, 3 Maule & Sel. 259.

<sup>5</sup> 5 Mee. & Wel. 454.

not merely by his true name of baptism, but by any first name which he has acquired by usage or reputation, though it was otherwise held in the case in *Vin. Abridg. Misnomer*, c. 11. If a party is called and known by any proper name, by that name he may be sued, and the misnomer could not be pleaded in abatement."

The means by which a change of name may be effected receives some shade of doubt from the language of conveying precedents, and from some old cases. A quotation from a modern precedent by an esteemed conveyancer will show the prevalent notion of that branch of the profession. It is the proviso for taking a surname, and runs as follows:—  
 "Provided always, that every person not having *otherwise than by the unauthorised assumption thereof*, the surname hereinafter required to be taken and used, who shall become entitled, &c., shall, within eighteen months after becoming entitled, endeavour to obtain an act of parliament or licence from the crown, authorising such person to assume and use the surname of ———, either alone or in addition to his or her proper name, but so that the name of ——— shall be the last and principal name."

The necessary means for effecting a change according to this precedent (which is generally the language of such clauses) are either an act of parliament or a royal licence. Before noticing whether either of them are needful, we may be allowed to say, that as the substantial object of the testator or settler was to render it essential to the enjoyment of his property that the donee should change his surname, the clause should simply direct accordingly; and there is no occasion to burden it with directions how that object is to be effected. If an act of parliament be necessary, then, of course, an act must be procured; or if a royal licence be the essential mode, then that must be obtained; that is to say, if there be a course laid down by the law for effecting the change, such course must necessarily be pursued independently of any direction in the clause. It is obviously not necessary when a certain act is to be performed, that the machinery for accomplishing it should be detailed. The conditional journeys to York and Rome, met with so plentifully in Coke and else-

where, would have been absurdly clogged with a detail of the method of journeying. Added to the surplusage of stating the mode of procuring the change, it has the disadvantage of making the means detailed part of the condition; and thus, although it might be that another and less expensive mode existed for accomplishing the same object, yet the obtaining of an act or licence is made the essence of the condition. We may further remark, that the specification of the means, by the words Act of Parliament or Royal Licence, shows that the framers of these clauses appear to have been in doubt which was the proper mode; and on that ground alone the donee might safely have been left to effect the change by the legal mode, if any were pointed out by the law, as, of course, an illegal assumption would not be a compliance with the condition. If an act of parliament be necessary, then we apprehend no other power can render the change legal. If, on the other hand, the granting of the licence be a prerogative of the crown, we conceive it cannot be granted by any other power. It is, however, the practice for both those high powers to give the liberty of changing names without any hesitation; and this circumstance, to our mind, indicates that neither power claims the prerogative, and that it is only because the testator makes one or other of those authorities a conditional means of effecting the change, that in mercy to the devisee, who could not otherwise acquire the property, they grant the licence. We have no doubt they would similarly assist in a case where the property was conditioned to be held by acting in any particular way by their permission, as if it were, to marry a cousin by authority of parliament or royal licence.

The authority for the practice which now prevails of directing an act or royal licence to be obtained (independently of usage fostered by conveyancing verbiage) is perhaps to be found in *Barlow v. Bateman*<sup>1</sup>, decided on appeal to the House of Lords. In that case the testator, whose name was Barlow, gave an additional legacy to his daughter, upon condition that she married a man who bore the surname of Barlow. A coach

<sup>1</sup> 4 Bro. Par. Cases, 194.

harness-maker's apprentice, of the name of Bateman, getting information of the prize, dropped his name of Bateman, and assumed that of Barlow, and then married the daughter. By his answer, he admitted that on the occasion of his marriage, and not before, he assumed, and took upon himself the name of Barlow, in order to entitle himself to the legacy. The Master of the Rolls considered that the condition had been complied with, and decreed payment of the legacy. The decree was reversed by the Lords; but the grounds of their Lordships' judgment are not stated by the reporter.<sup>1</sup> Possibly it was upon the fraudulent motive of the party assuming the name, or, more probably, on the ground that the testator's intention pointed either to a relative of his name, or one who happened to have the name as his original name, for in one part of his will he mentions the husband as "a Barlow." It would not, however, seem to be a fair conclusion that the reversal was on the ground that the assumption of the name was illegal, by its not being by act of parliament or royal licence. Another shadow of authority for the ordinary practice may be found in *Gulliver v. Ashby*<sup>2</sup>, where the condition was, that the parties benefited should change their surnames, and take upon them and their heirs the surname of Wykes, only and not otherwise. Lord Mansfield observed, "Many acts are to be done in order to oblige the heirs to take it, such as a grant from the king, or an act of parliament." This was not a decision on the subject; and it is to be remarked, that there was the special circumstance in the case, that the change of name was to be extended "to the heirs" of the parties; and to this his Lordship's observation was directed.

The above dictum was referred to by counsel in the before-mentioned case of *Leigh v. Leigh*, as deciding that change of name could only be effected by act of parliament or royal licence. It was not necessary to come to any conclusion on

<sup>1</sup> In *Leigh v. Leigh*, 15 Ves. 100. The plaintiff's counsel said that the only reason stated on the appeal was that the respondent could not assume the name legally, otherwise than by act of parliament: we cannot find any reason whatever stated in the report.

<sup>2</sup> Burr. Rep. 1929.



the subject; but the Lord Chancellor threw out a remark upon the distinction between the effect of an act and a licence: — “An act of parliament giving a new name (said his Lordship) does not take away the former name — a legacy given by that name might be taken. In most of the acts of parliament for this purpose there is a special proviso to prevent the loss of the former name. The king’s licence is nothing more than a permission to take the name, and does not give it. A name, therefore, taken in that way is by a voluntary assumption.” The necessity for either mode was not the subject of decision, but the remark is important, as pointing out in those cases where an act or royal licence is made necessary by the condition itself, which of those instruments should be applied for. If the distinction taken by his Lordship be sound, it would require an act in all cases where the original name was to be wholly abandoned, and a new one substituted; and that a royal licence would be sufficient only in those cases where the new name was simply to be an addition to the family name.

Such, we believe, are the authorities for the opinion that a party cannot change his name, by alteration or substitution, without the assistance of an act or royal licence; and we contend that they do not warrant any such conclusion, but that the necessity for invoking the aid of those powers is created by the language of the condition, and that there is ample authority of a decisive kind for holding that no such assistance is requisite, and that the reference to such aids by the verbiage of conveyancers is foreign to the object of the clause, and burdensome to the devisee in time, trouble, and expense.

We proceed to support our position, making the preliminary remark that a change of name, to be effectual, should be such as to enable the party adopting it to use it with effect on these several occasions—granting and taking under grants, suing and being sued, contracting marriage, and lastly, taking under a devise or bequest conditioned for bearing a particular surname either additional or substitutionary. These it occurs to us are the principal, if not the only occasions on which the legality of the change can be called in question; and we

hope to establish that in all these particulars the simple assumption of the desired name by ordinary publicity, and the continued use of it, as effectually add the name or substitute it for the original one, as either an act of parliament or royal licence.

That a person may alienate or acquire property by an assumed Christian or surname, it is sufficient to refer to the under mentioned authorities, which establish — that a deed is good though it be by a surname altered in a slight degree, or altogether different, for a man may have two surnames; that a man baptized by one name and known by another, may effectually grant by the reputed name: the grantor or grantee, although regularly they ought to be named by the Christian and surname, are sufficiently so if it be by a description whereby they may be known.<sup>1</sup>

To prove that the simple adoption of a name is sufficient for the purpose of suing and being sued, we may refer to the same authorities as showing that “a surname by which the plaintiff is known is sufficient;” and the plaintiff may reply to a plea of misnomer that he is known by the one name or the other. A defendant need not aver that he was baptized by his Christian name, only that it is his name and by that name he was always called; and on a different name being given by the plaintiff to the defendant, the defendant must traverse that he is *known* by such name, and the plaintiff may reply that the defendant is known by one name or the other. We may also refer to *Williams v. Bryant*, already noticed. In *Mestaer v. Hertz*<sup>2</sup>, the plaintiffs had misnamed the defendant Moses Isaac instead of Maurice Jacob. Leave was given to amend, and Lord Ellenborough said, “The plaintiffs have described the defendant by a wrong name, having perhaps heard him called by that name once or twice; but that would not be sufficient to maintain an issue upon the misnomer, because, whether his name be so or not, depends not upon one or two occasions, but on a plurality of times that he may have been so called.” The clear result of the decision is,

<sup>1</sup> Com. Dig. Fait. E., Capacity Grant,

<sup>2</sup> 3 Maule & Sel. 450.

that reputation would have been sufficient to establish as between the plaintiff and defendant the new Christian name against the original one. *Rex v. Norton*<sup>1</sup> is an instance of the adoption of a name by a prosecutor being upheld against the objection that the original name should have been used. The prisoner was tried for stealing from the dwelling-house of Mary Johnson, and it was objected that her proper name was Davis. She had, however, used and been known by the name of Johnson for five years past; and the prisoner having been convicted, the judges held the conviction right, as the time she had been known by the name of Johnson warranted her being so called in the indictment.

The surname of a bastard is gained only by reputation, which we consider is really the case with all surnames, though the names of the issue of a valid marriage follow the parents' name without any question or evidence as to reputation. The necessity for establishing a bastard's name by reputation is strongly shown by the case of *Rex v. Clark*.<sup>2</sup> The indictment named the party injured as George Lakeman Clark, he being the illegitimate child of the prisoner Frances Clark, and had been baptized by the two first names, but there was no evidence to show that it had obtained or was called by the mother's name; and the judges considered, that as the child had not obtained its mother's name by reputation, he was improperly called Clark in the indictment.

We will next consider the effect a change of name by simple adoption would have on a marriage by it; and we think this will afford a very satisfactory test of our proposition, that an assumed name may supersede an original one, and constitute the future true name, and that this is equally the effect whether the Christian name or the surname be the subject of change.

The old Marriage Act<sup>3</sup> required "the true Christian and surname" to be delivered to the minister. In *Frankland v. Nicholson*<sup>4</sup>, the female's original name was Ann Nicholson,

<sup>1</sup> Russ. & Ry. C. C. 510.

<sup>2</sup> Ibid. 358.

<sup>3</sup> 26 Geo. 2. c. 33. This act is repealed by 4 Geo. 4. c. 76., but re-enacted in this particular by the same words.

<sup>4</sup> Reported in note, 3 Maule & Sel. 259.

but she assumed the name of Ross, and by that name was married. There were circumstances showing that the name was assumed in such a way as justified the Court in holding that it had not superseded the original name. Sir William Scott said, "It has been argued that the true and proper Christian and surname of the party cannot be altered but by proper authority, by the king's licence or an act of the legislature. There may be cases where names acquired by general use and habit may be taken by repute as the true Christian and surname of the parties. If a person has acquired a name by repute, in fact the use of the true [original] name in the banns would be an act of concealment that would not satisfy the public purposes of the act, therefore I do say, that names so acquired by use and habit might supersede the use of the true [original] name." This case clearly indicates that the assumption of a name for no fraudulent purpose would be justifiable, and would become the *true* name of the party within the meaning of the Marriage Act. A still more satisfactory case, because involving the consideration of the change, not only of the surname but also the Christian name, is to be found in *Rex v. Billinghurst*.<sup>1</sup> A person whose baptismal and surname were Abraham Langley, on removing to a different part of the country assumed the name of George Smith, and after having resided in that place for three years, and being always known by the name of George Smith and no other, married by that name. It was contended that the marriage was void, by reason that the names given in by the husband were not his true Christian and surname. The Court decided that the marriage was valid. Lord Ellenborough said, "The object of the act in the publication of banns was to secure notoriety, to apprise all persons of the intention of the parties to contract marriage, and how can that object be better attained than by a publication in the names by which the party is known? If the publication had been in the name of Abraham Langley, it would not of itself have drawn any attention to the party, because he was unknown by that name. Therefore the publication in

<sup>1</sup> 3 Maule & Sel. 250.

the real [original] name, instead of being notice to all persons, would have operated as a deception; and it is strictly correct to say that the original name in this case would not have been the true name within the meaning of the act." The validity of a change of name as regards a marriage by it is further strengthened by another decision of the Court of King's Bench<sup>1</sup>, where the alteration of name was really assumed for an illegal object, but not to evade the Marriage Act. It appeared that a person, whose original names were Joseph Price, deserted from the army, and to conceal his desertion assumed the name of Grew, by which name he was alone known in the place where he had resided for sixteen weeks previous to the marriage, although in his father's family and where his family resided, he was still called Price. His marriage took place where he was known by the assumed name, and the Court held that he was married by his true name, and that there was no fraud against the Marriage Act. One more case will, we trust, satisfactorily confirm the validity of a marriage contracted by a name assumed, without the authority of an act or licence. In *Rex v. St. Faith*<sup>2</sup>, the wife (who had been a widow) had after her belief of her husband's death, assumed and continued to use for some years her maiden name, and by that name was married, describing herself as a widow, and the marriage was held legal. Bayley J. "Where the party has assumed a new name, not for any fraudulent purpose, but fairly and openly, and has for a considerable period used and been known by that name, then it has been in several cases decided a marriage under that name is valid."

The change of name which takes place with regard to a wife, both during coverture and a subsequent widowhood, can hardly be accounted for or held valid on all the numerous occasions where correctness of name is requisite, except on the ground that the party has the power of so altering her name. It seems clear that it is not the marriage which effects the change, because *after* the solemnisation, when the marriage is indissoluble except by the legislature, the signature

<sup>1</sup> *Rex v. Burton-on-Trent*, 3 Maule & Sel. 537.

<sup>2</sup> 3 Dowl. & Ry. 348.

to the marriage register is always by the wife's maiden or former name. Both under the repealed act 26 G. 2. c. 33. and the existing act 4 G. 4. c. 76., as also the 6 & 7 W. 4. c. 86., the schedules give the form of register to be signed by the parties, and fill up the signature of the newly made wife by her former name.<sup>1</sup>

We proceed to the principal object of our proof, namely, that where a condition is annexed to a gift that the devisee shall take any particular name, it is sufficient for the party simply to assume and use it without the expensive aid of either act of parliament or royal licence; and we will produce most satisfactory authorities to show that such an assumption is a valid compliance with the condition. Our observations and application of the cases will of course only apply to those instances where the condition is simply for bearing, changing, or using of the name, and not to those clauses where the condition is trammelled by specifying the mode in which the condition is to be performed.

The first case which fully bears on the subject, is that of *Barlow v. Bateman*<sup>2</sup>, the appeal from which has been already noticed, as affording some slight appearance of justification for resorting to the crown or the legislature, though certainly not for stating the mode in the clause itself. The condition was to marry a man of the surname of Barlow, and which a bold city apprentice attempted to perform, by changing his name from Bateman to Barlow, for the express and only purpose of acquiring the legacy on his marriage with the daughter. The Master of the Rolls considered that the condition was performed, and the husband entitled to the legacy; and although his decision was reversed by the House of Lords, yet, as no reasons were given, we are at liberty to

<sup>1</sup> The decisions on the old Marriage Act on this head are equally applicable to the act repealing it (4 Geo. 4. c. 76.), and also to the Dissenters' Act (6 & 7 W. 4. c. 85.). The latter act requires one of the parties to give notice of the *name* and surname of each of the parties, which it will be perceived is not so strongly worded as the act of Geo. 2. or Geo. 4., which required the *true* christian and surname to be given. The effect is of course the same in both acts, as if a wrong name were given, it would neither be the *true* name nor the name of the party.

<sup>2</sup> 3 P. Wil. 65.

imagine such grounds for their Lordships' decision as may be consistent with former cases, or the general principles of equity (to which we have already ventured to refer it), rather than as operating to overturn not only the decision reversed, but the observations leading to it. The decision of the House merely establishes that the assumption of the name was not sufficient to earn the legacy, but does not decide that the defendant had not acquired the name of Barlow; and, moreover, it does not show that either act of parliament or licence would have made him "a Barlow" within the meaning of the will. The observations of the Master of the Rolls (Sir Joseph Jekyll) are much to the general point, and we shall show are fully borne out by subsequent decisions. His Honour said, "I am of opinion the condition is complied with by the defendant taking the name of Barlow. Surnames are not of very great antiquity, for in ancient times the appellation of persons were by their Christian names, as Thomas, of Dale, viz. the place where he lived. I am satisfied the usage of passing acts of parliament for taking upon one a surname, is but modern; and any one may take upon him what surname, and as many surnames as he pleases, without an act of parliament."<sup>1</sup>

The leading case upon this subject may be considered to be that of Doe dem. Luscombe v. Yates<sup>2</sup>, which embraced the consideration of a condition clogged with some of the detail of means we have before deprecated, but which was rendered useless and harmless by the additional direction that

<sup>1</sup> The report of this case is somewhat inaccurate, as the condition is stated to be the marrying of a person who bore the surname "*and arms*" of Barlow. It is quite clear if it had been so there would have been little doubt that the condition had not been complied with. The extract from the will at the foot of the report, and the statements on the appeal (4 Bro. P. C.) amply disprove the addition of *the arms*. We may remark, as to the third volume of Peere William's reports, that some damage is done to it as an authority by the observation of the Vice-Chancellor of England in *Gervis v. Gervis*, 14 Sim. 655. "On 12th November, 1821 (his Honour remarked), Lord Eldon said, and I noted it down at the time, that the cases in the third volume of P. Wms. were not of equal authority with the cases in the two first volumes. He published those two volumes during his lifetime, but he did not publish the cases in the third volume, because he did not think them of equal authority."

<sup>2</sup> 1 Dow. & Ry. 187. S. C. 5 B. Ald. 544.

the change was to be accomplished by "some other effectual way for that purpose." The testator John Luscombe devised certain estates to John Luscombe Manning for life, he taking and using the testator's surname of Luscombe, as for and instead of his own name. The express proviso was, that the devisees under the will should take the name of Luscombe, and use the same as for and instead of their own surname; and should within three years then next after, get and procure their own names to be altered and changed to Luscombe by act or acts of parliament or some other effectual way for that purpose; and should for ever after have, use, and bear on all occasions the surname of Luscombe. John Luscombe Manning, the devisee, before he became of age or entered into possession of the estate, took upon himself, used and bore the surname of Luscombe, but did not within the three years obtain any act of parliament or royal licence for that purpose. The question for the Court was, whether by the simple assumption of the name he had complied with the condition. The opinion of the judges was, that he had effectually complied with it. The Lord Chief Justice Abbott: "It is said that the devisee did not comply with the terms of the proviso, because although he had taken and used the surname of Luscombe before he came to the estates, yet he did not within three years after he took possession take that name by virtue of any act of parliament or other authority for that purpose. A name assumed by the voluntary act of a young man on his entrance into life, adopted by all who knew him, and by which he is constantly called, becomes for all purposes that occur to my mind, as much and as effectually his name as if he had obtained an act of parliament conferring it on him. We would not be understood to say, that where a testator requires a name to be taken by act of parliament or other specified mode, any mode falling short of the specified mode may be substituted for it. A bearing *de facto* answers every useful purpose that could be obtained under an act of parliament."

The above case has also the confirmation of the Lord Chief Justice Tindal in the case of *Davies v. Lowndes*.<sup>1</sup> The

<sup>1</sup> 1 Bing. N. C. 597. S. C. 2 Scott, 102.



devise was to William Lowndes (if no heir of the testator could be found), on condition that he changed his name to Selby. The real question at issue was, whether a particular person was not the heir entitled. The validity of the mode by which William Lowndes effected the change of name could hardly come in question, and it was but slightly touched on by the claimant. The facts seemed to be, that William Lowndes for two or three years after the testator's death continued the name of Lowndes, and was appointed receiver by that name.

He afterwards used the name of Selby as an addition to his former name, and eventually substituted Selby for Lowndes, but never obtained either act of parliament or royal licence. The popular notion that one of these modes could alone effect the change, seemed very strong in the mind of one of the gentlemen of the grand assize (it was a trial on a writ of right), and he pressed it on the attention of the Court. His lordship in his charge, (as we hope) set his mind at rest. He said, "It has been more than once asked by a *learned* gentleman of the grand assize, whether the name has been changed in the way which the law prescribes. There is nothing in the will purporting that the condition is to be executed in a very limited or precise time, neither does the law point out any mode by which such change is to be effected; therefore, though he took it a little later, and though in some particular acts he might use the other name, it would not at all interfere with the general act of changing his name, and there is no necessity for a royal sign manual to change a name. It is true that it is by no means an uncommon thing for parties, in order to give a greater apparent sanction and a more extensive notoriety to the fact, to obtain a royal licence for changing the name; but a man may if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his new name as well as he can."

We trust these authorities abundantly prove that any one who is dissatisfied with his present name, or desires another added to it, or is directed to take or add a name, may legally and effectually do so by simply commencing and continuing the use of such desired name, without resorting to the

Legislature or invoking the assistance of the Crown. And further, that as we cannot imagine it to be the intention of testators that their gifts should be burdened with unnecessary expenses, but that the valid and effectual change of name is all they wish, it is a breach of duty in the framer of the clause, and, in any event, unnecessary verbiage, that an act of parliament or royal licence should be specified as the means; and that the necessity for resorting to any one of those means is created by the language of the condition, and not otherwise.<sup>1</sup>

In conclusion, we would not hesitate to recommend all those who, from any of the causes we have before alluded to, may feel dissatisfied with names they now possess, to change them for such as they may deem more inviting, or less offensive in sound or sense; and as to those who are required to adopt any surname by a condition annexed to a gift, we think there can be no hesitation in adopting such name by the simple mode we have before pointed out. As to others who are so unfortunate as to find the course of procedure chalked out for them, we fear there is no help but pursuing it, and purchasing either the pompous Act of Parliament or her Majesty's signature to a licence accordingly. We think that, although not necessary, yet it is advisable, to make the change as public as possible, and also to preserve a record of it, and therefore suggest that the change of name should be notified in the "London Gazette," and such other public papers as he may think proper.<sup>2</sup>

<sup>1</sup> Our view is somewhat strengthened by a precedent in Sir Orlando Bridgman's Conveyancing (vol. ii. p. 8.) for enforcing the taking of a particular name. The clause was by way of penalty, and this was to be incurred "if the husband of the lady should use any surname immediately after his name of baptism, other than the name of P—, or should not within a year after the marriage and entry into possession either procure an act of parliament that such husband and the Lady A. and the heirs and issues of their bodies should at all times have and bear the surname of P—, or otherwise give such security unto the trustees that such husband, &c. should in all writings by them to be made and subscribed by their names, write and cause to be written their surname by the name of P—. This latter part shows the opinion of the learned conveyancer to be, that the obtaining an act of parliament was not necessary for the real object of the clause, but happened to be, or was made to appear, the express wish of the settlor.

<sup>2</sup> We submit some simple forms of such notification in the case of change of

## ART. III. — INTERNATIONAL LAW.

## PART. II.

*Its Basis, its constituent Parts, their distinctive Characters,  
its Records.*

IN our Article on this subject in our last Number, we endeavoured to point out the boundaries of the subject of our inquiries as being properly and strictly International Law, not the ethics or morality of nations, but compulsory or coercive law, unfolding rights and obligations susceptible of physical enforcement; and we also endeavoured to trace the different sources of that law; meaning by that term the scientific sources of the rights and obligations of which International Law is composed as existing in nature, or arising in the natural or ordinary course of events taking place on this earth; not the mere record of those international rights and obligations. In investigating these sources, we found ourselves constrained and authorised to recognise and admit three of them — First, the co-existence and co-existent position and mode of communication among nations as established by physical material causes or laws in the construction

name from some general causes or in compliance with the direction in a will. —

"I, the undersigned, formerly John Rawbones of ———, in the county of ———, gentleman, hereby give notice that I have abandoned the surname of Rawbones, and have taken and assumed, and shall continue to use and bear, the surname of *Mortimer*, in lieu of my said former surname. Dated, &c.

"JOHN MORTIMER,

"formerly JOHN RAWBONES."

If in compliance with a will, —

"I, the undersigned, formerly Henry Smith of, &c., hereby give notice that in compliance with the direction in that behalf contained in the will of Thomas Harcourt of, &c., deceased [I have abandoned the surname of Smith and] have taken and assumed, and shall continue to use and bear, the surname of Harcourt in lieu of my said former name of Smith. Dated, &c.

"HENRY HARCOURT,

"formerly HENRY SMITH."

If the name be an additional one, omit the words within brackets, and substitute —

"I have taken and assumed, and shall continue to use and bear, the name of Harcourt in addition to my said surname of Smith. Dated, &c.

"HENRY SMITH HARCOURT,

"formerly HENRY SMITH."

of the surface of this globe, and the physical mental causes or laws established in the constitution and organisation of mankind as united in civil society, forming communities or states, and exercising an influence upon each other according to their respective degrees of advancement in civilisation. Secondly, the acts of nations in relation to other nations, and affecting other nations, but separate and unilateral, without any joint agreement, compact, or convention; without any union of two or more wills. Thirdly, the joint acts of nations, agreements, compacts, or conventions; the union of two or more wills, fixing the rights and obligations of nations towards each other for the present, and in future, so long as such agreements and conventions endure, and so far as they extend.

But although, from observation and experience, we were led and authorised to recognise three sources of International Law, it does not follow that we are required to admit or recognise three different kinds of that law, or to make of it a three-fold or tripartite division. For, upon more minute examination, it will be found that each of these sources does not produce a separate set of rules or collection of rights and obligations of such an identical or similar nature, possessing such a collection of similar qualities in common, as to constitute each a separate and distinct body of law. On examination, it will be found that the first and second sources concur in producing only one set of rules, or collection of rights and obligations, as that just alluded to, and the third source another. The class or kind of law, or compulsory legal rights and obligations, arising from the first and second sources, are distinguished by the qualities of being General and Common; most of them essential and permanent; arising, not from any union of the wills of mankind, joint consent, or agreement, but from certain physical relations, material and mental, among nations, existing, or arising, or coming to take place, as events, facts, or unilateral acts; proved chiefly by long-established customs and usages, consisting not merely of senseless repetitions of the same useless or indifferent acts, but of repetitions for such a length of time, and so uniform, as to indicate, as their cause, a conviction in the people that such

are the rules of right and obligation, and therefore of compulsory or coercive law. The other class or description of legal rights and obligations among nations, arising from the third source, is distinguished by the qualities of being Particular or Special, arising from the union of the wills or joint consent of two or more nations, from agreement, compact, convention, or treaty. There thus, we find, exist, not three, but only two descriptions, constituent parts, or branches of International Law, of which the boundaries, like the colours in the rainbow, may run into each other, but are sufficiently distinguishable; namely, General Common Law, mostly essential, or permanent, arising from the physical, material, and mental relations of nations as located on the surface of this earth, and affecting each other by their unilateral acts without any previous agreement; and Particular International Law, arising from the union of the wills of nations, as expressed in compacts, conventions, or treaties, and generally or usually called Conventional, or *Jus Pactitium*. And these two component parts or branches of International Law, we shall now consider separately.

*Of the first component Part or Branch of International Law, usually called Common and Consuetudinary.*

In further considering the basis of the Common Consuetudinary Law of Nations, its distinctive character, and the evidence by which it is supported, we shall begin with briefly recapitulating what we observed in our last article on this subject, in tracing the scientific sources of International Law generally, so far as regards this branch; and we shall then answer, and we trust refute, the objections which have been stated of late years by some Continental lawyers, to the validity and binding nature of Common Consuetudinary International Law, including a reference to its records.

As in the internal private law of nations, the legal obligations of individuals to each other are not limited to those arising from agreements, or contracts, although numerous and of great importance, so in International Law, all the legal obligations of nations, in relation to each other, do not arise from treaties. On the contrary, as in the internal pri-

vate law of a people, prior to and after legislative enactments, there are perceived or apprehended, and felt, certain juridical or legal relations among individual men, from their constitution or organisation and position on the surface of this globe, from their birth and death, the mode in which the species is propagated and perpetuated, and the consequent connection of family and kindred; from their congregating and living together in civil society, and from their individual intercourse, as members of that community, for the various purposes of life; so in International Law, both before, and after, and independent of the existence of treaties involving the mutual consent of separate and independent states, there exist certain juridical or legal relations among these nations, viewed, as of themselves each constituting a whole, as assemblages of men united under one government, and forming independent states, arising from their co-existence, their constitution, and organisation as such, from their relative position and circumstances, as consisting of different races, as occupying different territories, divided by seas or ranges of mountains, and particularly from their intercourse by land or sea, in commerce or otherwise, for the purposes of obtaining the necessaries and enjoying the comforts and superfluities or luxuries of life.

Those primary and essential juridical relations, rights, and obligations which thus arise, under the physical laws established by the Omnipotent and All-wise Creator, from the common constitution, corporeal and mental, of mankind congregated into communities and states, and from the circumstances in which they are located, are obviously not the creatures of contract or convention. Most of them are intuitively perceived, instinctively felt, and acted upon, by all individuals of ordinary intelligence; they exist, as M. de Savigny observes, in the common consciousness and conviction of the people; and they are called *Consuetudinary*, as well as *Common*, because they exhibit themselves in the permanent usages and uniform habits and practices of nations, indicating, by their continued repetition and uniformity, the consciousness and conviction of their legality. They are what the Prussian Professor, Heffter, terms, "the fundamental rela-

tions of states as such, — the essential rights and obligations of nations.”<sup>1</sup> They are manifestly anterior to human laws and conventions, and are the bases of all the rights and obligations arising from the acts, whether unilateral or bilateral, of mankind, united in civil societies. Though frequently violated by ambitious governments and aggressive nations, these are recognised in their very violation by the attempts usually made in declarations of war, and other such proclamations and manifestoes, to justify the unlawful proceedings.

But besides those primary juridical relations, those common fundamental and essential rights of nations, which arise from the physical laws established by the omnipotent and all-wise Creator in the corporeal and mental constitution of mankind, and in their location on this earth, as different races, and separate tribes and communities or states, not from futile human conventions, or pretended astute diplomacy, there are also comprehended under common consuetudinary International Law other juridical relations, rights, and obligations, which do not arise until they are called forth into existence, and come into operation through the delegated power of action bestowed by their Creator on mankind, — on states as well as on individuals.

For, as in the internal private civil law of states, juridical or legal relations among individuals arise, not merely from agreements or contracts between or among them, but also from the unilateral acts of individuals, either illegal, as producing the obligations of restitution or reparation, or legal, creating a right in others such as that to recompense or reimbursement, so, in International Law, a nation or state may not only by its illegal act, or series of illegal acts, such as unprovoked invasion and plunder, subject itself to the legal obligation of restoring matters to the *status quo*, and of repairing damage and defraying the expenses of the war occasioned by the invasion to the party aggrieved, but may also, by its act or series of acts, that is, conduct towards other nations in matters which are comparatively indifferent or which do not involve any violation or infringement of the rights of others, create a right in other nations to act in the

1 Das Europäische Völkerrecht der Gegenwart, 1844.

same manner towards that nation, and to treat it in the same manner as it treated them, upon the juridical or legal principle of retributive justice or reciprocity.

But here it is necessary to investigate more narrowly the nature, operation, and effects of the unilateral acts of nations, as establishing International Law. So far it is obvious that these separate and unilateral acts performed by a nation, however valid and effectual, and binding upon all the members, citizens, or subjects of the state, cannot, like the bilateral contracts between nations, or treaties before alluded to, bind, or impose any legal obligation on other separate and independent nations, or render any rules thereby sanctioned a part of International Law, obligatory on other independent states. It has been said that by his celebrated Ordonnance de la Marine of 1681, Louis XIV. intended to dictate to other nations, and to impose a code of Maritime International Law on Europe. But his able ministers and the framers of that ordonnance, whoever they were, had too much sense not to be aware that it had and could have no legal validity beyond the subjects of France, or the inhabitants of the other territories which Louis had subjected or might subject to his sway; and could have no influence over other nations, beyond the reasonableness and equity of many of its regulations, — the *Ratio Legis*.

Although, however, the unilateral acts of, or the particular regulations established by, the supreme power of any one state cannot directly bind or impose any legal obligations upon other independent states, they may have a legal effect in various other respects. And now we again find it necessary to make some distinctions, according to the nature of these acts. In the internal jurisprudence of states we found that without any contract, or previous authority, commission, or mandate, beneficent actions might create the legal obligations of reimbursement of expenses beneficially incurred, or of remuneration for services which had proved useful or profitable; but that while such beneficent unilateral actions seldom occurred in the intercourse of nations, unilateral acts, obviously hurtful and aggressive, gave rise to the rights of resistance, of restoration to the *status quo*, of restitution of



moveable property violently or fraudulently abstracted, and, where restitution is impracticable, of reparation for damage inflicted. But besides such beneficial and hurtful or injurious acts, there are various others, which are not properly or precisely of either description, but which originate rights and obligations. In this view, without attempting any exhaustive analysis, we may consider states either in their active or their passive and acquiescent capacity, or as each following the same or similar courses of action, but without any previous concert or compact. Thus a state which acts in a certain way for a long period, or for ages, is not entitled suddenly or without due previous notice, to change that mode of conduct, upon which other nations have relied, so as to occasion damage to them. And this rests upon the same mere general principle upon which the legal obligation to fulfil contracts is founded, viz., the obligation not to disappoint the reasonable expectations which we have excited, and thereby occasion damage or loss. Again, a state which acts in a particular manner towards other states for a long period, as for ages, gives them, upon the legal principle of reciprocity, a right to act towards it in the same or a similar manner. On the other hand, a state which for a long period acquiesces in the conduct of other states towards it, not positively hurtful, gives them a right to infer or presume its consent, and to continue the same mode of conduct, until it protests against such conduct. Again, when all the states under contemplation adopt, without any previous agreement, the same rule in relation to each other, and persevere in it for ages, they give each other a right to rely upon the continued observance of that rule in time coming; and although, perhaps, each state may change that rule, so far as regards itself, at least, by relaxing it in favour of other states, it does not follow that other states are legally bound also to change the rule which has been observed for ages, or, if the rule be founded in juridical relation and legal principle, can be legally compelled to deviate from it.

Again, when in the course of events, and in the varied intercourse of nations in their reciprocal acts, the rights of different states come in competition, and there is a collision,

it seems plain that, if one must so far yield, the primary and essential right, which is of the greatest importance, is entitled to be supported, and that the inferior or subordinate right, which is of less urgent importance, and which admits of compensation for the non-exercise or limited exercise of it, must yield; not the *former*, the more important right, which does not admit of such compensation in any shape; provided always its exercise be regulated by all reasonable and salutary practicable restrictions.

In these different cases, although there be no convention, there is obviously at least a legal principle for their decision. But, in various other unilateral acts, which may be performed by nations, such a principle is not so apparent or discernible; the determination appearing to turn very much on the long continued and uniform repetition of the act, the habit, or custom or usage. And here, certainly, the doctrine of M. de Martens in his *Droit de Gens Moderne de l'Europe*, s. 67., is not very satisfactory:—"Simple usage," he says, "comprehends only an imperfect obligation; it cannot, therefore, be extorted or exacted by force; each nation preserves the right of departing from it, or abolishing it, provided it gives notice in time of such departure or abolition. This considerable part of our position, or established law of nations, which is founded upon usages, appears, then, to rest upon a feeble basis, and to be subject to perpetual vicissitudes. The less intrinsic force, however, that usage has, the more it unites with it external arguments, to ensure its duration to a certain point." These arguments M. de Martens states to be, "1. The natural force of habit which, in acts of minor importance, and frequently repeated, exercises its power over nations as over individuals. 2. The peculiar advantage which results from the continuance of certain usages. 3. The desire of appearing in the eyes of foreigners, a civilised, enlightened, and well-intentioned nation; on the other side, the fear of a *retorsio juris*, on the same point; the fear of seeing ourselves refused other points of usage, in compensation of those which we have refused; the fear that other nations might make common cause against us in the refusal of usages which it is important to us to see observed; and, finally, the

fear that the violation of usages practised among friendly nations might be interpreted by others as the precursor of actual injuries with which they were threatened on our part, and, in this point of view, be considered, as a reason justifying the anticipation of the hostilities, to which they believed themselves exposed."

Now these considerations are certainly strong in a national and prudential point of view. They seem to impose more than what M. de Martens, like many other modern jurists, calls absurdly an imperfect obligation, in other words, a merely moral or ethical obligation, which does not admit of enforcement. Nay, it is through the self-interested views and fears of individuals that the internal criminal law of states chiefly operates in the prevention of offences.

But beside these considerations going far to impose a legal coercive obligation, much stronger than what some recent jurists have ascribed to mere *comitas gentium*, or *convenance reciproque*, and beside the legal effect of usage, which we have just considered as affording evidence of consent, to the limited extent of precluding a sudden alteration of the usage, to the injury of other nations, there remains the true and solid basis of all Common Consuetudinary law, whether internal or external and international, so far as dependent on human action, as ingeniously and profoundly illustrated by some recent German lawyers of the first order, such as M. de Savigny and Professor Puchta. For here, again, the principles in which the internal Common Consuetudinary private law, or civil jurisprudence of states, is founded, it is proved from observation and experience, extend also and are likewise applicable to the external law of nations.

In the internal jurisprudence of states, as formerly observed, the legal validity and authority of Common Consuetudinary law do not solely depend or rest on the mere repetition of the same or a similar act, without regard to its nature or effects, or the views and feelings of the agent performing it. The custom or usage is not the foundation of the rule of the common law, or the basis on which it is reared. It is the sign, or mark, or indication of the rule having been recognised as legal, in the conviction of the people. It is the evidence of such a

rule or course of conduct having been settled as legal by successive generations, just as the statute book is the evidence of certain rules having been recognised simultaneously or successively by the people in their legislative capacity, that is, by their representatives, as constituting a legislative body according to the form of their government.

All acts of any description are not qualified, or of such a nature as to become the indications of Common Consuetudinary law, however often they may be repeated, or however long continued. The act must be that of a rational being of ordinary intelligence, not absurd, or indicative of an insane or fatuous mind. It must not be a purely benevolent and beneficent act, or one of charity, or performed as becoming merely in a moral point of view, however laudable otherwise; for acts of purely benevolent generosity or charity, however often repeated, can never impose upon the agent a legal obligation, through which he may be compelled to perform such optional and discretionary acts. As little can the act be of a hurtful, aggressive, or criminal nature; for frequent repetition can never justify or palliate a crime, or create any legal obligation, except, as we have seen, the legal obligations of restitution and reparation. In truth, to found a rule of Common Consuetudinary law, it must have as its basis the consciousness and conviction of the people of the legality of the rule. But how is this to be ascertained? The following seems to be the answer and solution of the problem.<sup>1</sup>

The act must not be separate or individual; it must, like the common sense of mankind, be general and common to all the members of the civil society or community, or of the assemblage of nations or states, whom we contemplate as actually existing. Again, the act must not be single: there must be a plurality of actions repeated in succession; and the more open, public, and notorious, the better. Again, the course of acts, if they be not precisely identical or similar, must be uniform, without interruptions by intermediate acts of an opposite or different nature. Again, the acts must have been repeated for a considerable time; generally exceeding

<sup>1</sup> See Von Savigny, *System*, vol. i. s. 28, 1846. Prof. Puchta, *Das Gewohnheitsrecht*, third book, second chapter, 1937.

the ordinary or average duration of human life; varying with circumstances, but such as to guard against accidental, transient, and variable acts being erroneously assumed as indications of a common conviction of law. Further, judicial decisions have been generally admitted as sufficient indications of the existence of the rules of Common Consuetudinary law; and they partake also of the authority of the statutes or legislative enactments of the government, as the representative of the people, in so far as the judicial power in the state supplies the defect of the legislative power, inasmuch as the latter is not able to foresee and provide for all the cases that emerge in the progress of civilisation.

When the qualities or requisites here enumerated concur in the usage or custom, the fair inference and legitimate logical deduction from it is, that it implies, and is the result of, a rule of Common law, which corresponds to it, and lies at the bottom of it as its basis. The authority and legal validity are not derived from, and do not belong to, the custom or usage, of and for itself, but are derived from and belong to the rule of law, which is contained or implied in it, the *ratio juris*, the *opinio necessitatis*, which are discerned from the custom or usage, just as the statute law or legislative enactment is discerned and learned from the written or printed statute book.

Such being the true foundation of Common Consuetudinary law, in the private law or internal jurisprudence of states, so far as derived from or proceeding upon the unilateral acts, usages, and customs of the individuals of whom the nation is composed, we find, from observation and experience, that the same mode of reasoning is applicable, that the same juridical conclusions may be logically deduced from the unilateral acts, usages, and customs of nations, contemplated as wholes, as assemblages of individuals, in their intercourse with each other. Combining the strictly legal principles before noticed, and the influence of habit, and the considerations of prudence, danger of deviation, and urgent expediency, as before quoted from Von Martens, with the brief exposition just given, of the true foundation of Common Consuetudinary law in general, so far as resulting from the unilateral acts of mankind, either

as individuals or independent states, we may form a tolerably accurate notion of the grounds on which the authority, legal validity, and obligatory force of Common Consuetudinary international law rests. And applying these principles, the following seems to be the result.

If the government of a state prescribes to its subjects, regulations for their conduct towards the subjects of other states; or if, without any such directory regulations, a nation acts or proceeds in a certain manner towards other nations, and particularly if this mode of conduct is openly and uniformly continued and persevered in for ages, so as thereby to indicate and prove a consciousness or settled conviction and inward feeling of right in the individuals composing the nation and its government, that the mode of proceeding which has been followed is just and equal; other nations then become entitled, provided they have followed the same or a similar mode of action, not merely upon the legal principle of reciprocity as before noticed, to treat that nation in the same or a similar manner as it has treated them, but also, and further, to assume the said mode of action which has been openly and uniformly followed for ages by all the parties in common, without any previous joint arrangement to that effect, as a rule of Common Consuetudinary appropriately practical, international law, of which the legality has been recognised in their own conduct by all the parties interested in or affected by it, and which is to be relied on, at least till a new rule be adopted by the universal consent of all the parties interested, or till altered by a special bargain between the contracting parties, or a treaty. In this way, indeed, there is no meeting or assemblage at one time, no congress of nations or their representatives, agreeing simultaneously upon certain rules to be observed in future by all and each of them. But although they may not all assemble, even by their representatives in congress, and unite in one common contract or treaty, nations we have seen do *de facto*, from the similar corporeal and mental constitutions, views, and feelings of the individual men of whom they are composed, and from the similar circumstances in which they are placed, both in a rude state and in the progress of civilisation, act very much

in the same or a similar manner; and thus in time, come to adopt the same or similar, and so far, consequently, common rules of action towards each other, without any previous concert, or fixing these rules by any written contract entered into in common, just as in the interior of each independent state, the Common Consuetudinary or practical law grows up, without and to a much greater extent than legislative enactment or statute law. Further, as we have seen, the juridical or legal relations of independent states, and concomitant or consequent rights and obligations, besides those which arise from their natural constitution or organisation as such, and their respective positions as occupying separate territories, are extended and enlarged by their own separate and unilateral acts towards each other, without any mutual concert or joint arrangement. Nor is this principle of legal or compulsory justice confined to any particular department: it holds in war as well as in peace; it embraces all the points in which nations come in contact or collision with each other in their reciprocal intercourse, beyond what arises from their very constitution as independent states, and their relative position on the surface of this globe; and it rests on the same foundation as the rights of national independence and exclusive sovereignty and dominion.

The separate unilateral acts, or series of acts of nations, which thus recognise and give rise to reciprocal rights and obligations in nations towards each other, must, of course, be the acts or conduct of the supreme power of the state or government. But where, it may be asked, do they exist? Where is the evidence of them? Now, certainly while the records of the second kind or description of International Law, namely, the particular conventional law of nations, are contained in the conventions or treaties which modern nations have entered into with each other, and which exist to a large extent in the various ponderous collections of treaties, from those by Leibnitz, to those by Martens, the records of the first kind or description of International Law, namely, the general Common Consuetudinary law of nations, are not so easily discovered. General history gives little information on the subject. The evidence is to be sought in a greater

variety of documents, but still it exists, and to a large extent.

The first class of historical records in which this evidence is to be found, is that of the written or printed statutes or ordinances enacted or established from time to time by the supreme power of the state, legislative, executive, or administrative; whether they be called acts or statutes, ordinances, edicts, *règlements*, orders in council, or by any similar appellation, so far as they relate to or affect the rights or interests of other separate and independent nations or states, their governments or subjects. Next to these primary and direct acts of the state or government, come the determinations in individual cases, of the judicial establishments generally, of the courts of law of a country appointed by and acting under the authority of the state, particularly of the international courts of maritime prize law during war. And the records or reports of the decisions of these different courts, afford the next description of evidence of the conduct of nations, "in matters of general intercourse or collision of rights towards each other."

Further, the writings of the lawyers of a nation, and particularly of international jurists, afford a third, though perhaps inferior kind of evidence of such acts of nations as we are considering; namely, those which are productive of rights in other nations.

Of these three kinds of documentary historical evidence, the two first are plainly of the greatest weight; the judicial determinations, as well as the enactments or ordinances, of the legislative and executive powers, being acts of the supreme power of the state. So far as they record these acts, the writings of jurists are, of course, of equal authority. But otherwise or beyond that limit, they merely transmit their own intuitive convictions or logical deductions from such premises in point of legal principle, or merely record the prevailing opinions and sentiments in such matters, entertained and recognised by their nation or the intelligent part of it, or by nations generally. And if the views of such writers are to be received in general with suspicion of partiality from the natural influence of patriotic zeal, their testimony may at



least be received without distrust; where it is against the interests of their own country, or where it merely records the practice of their own country.

Compared with the more carefully preserved and, to a certain extent, better arranged and more accessible documentary evidence of Conventional International Law as contained in the ponderous collections of public treaties, the evidence of Common Consuetudinary International Law as afforded by the different kinds of historical documents just enumerated, has one considerable advantage or superiority. The latter record what the government or nation has actually done; the former merely afford evidence of the engagement which the contracting parties have undertaken, not of the actual fulfilment of these engagements, which governments have not unfrequently evaded.

In the last or French edition of his systematic work, entitled "*Elements of International Law*," 1848, the North American jurist, Dr. Wheaton, we observe, denominates the historical documents we have just been considering, the "sources" of International Law, instead of the "records"; as if we were to call the volumes of the statutes and of the reports of the decisions of the Courts of Common Law and Equity, the "sources" of the law of England. We prefer the term "records," as more applicable and appropriate, reserving the appellation of "sources" for the scientific sources of the law — those physical relations in the material and mental world exhibited on the surface of this earth, as giving rise to, or involving the juridical relations of rights and obligations susceptible of enforcement. But, of course, whether the one appellation be adopted, or the other, is of little consequence, provided the import be precisely explained and distinctly understood.

Having thus resumed the view with which we set out in our first article on the subject, when investigating the sources of International Law generally, and illustrated more fully the foundation and nature of the branch of that law which we are here considering, as now usually called Common and Consuetudinary, or Non-conventional, we proceed, as formerly proposed, to answer the chief objections which have recently

been urged to the validity of General Common Consuetudinary International Law, as not resting on a general compact among nations, or universal joint consent — as being obscure, from its very antiquity — as being liable to change, and vague — and as not entitled to the appellation of Common Law.

That the arguments urged and attempts made to invalidate the force of Common Consuetudinary International Law may be correctly and fairly represented, we shall quote some passages from the "*Règles Internationales et Diplomatiques de la Mer*," 1845, by M. Théodore Ortolan, the latest French writer on the subject, as to all appearance containing the opinions of the eminent French lawyers, whom M. Ortolan states he consulted in the composition of his work; and particularly of M. Dupin, who on two occasions in 1845 highly eulogised it in "*Reports to the Académie des Sciences Morales et Politiques*," forming the second branch of the National Institute of France.<sup>1</sup> As M. Th. Ortolan is not a practising lawyer or jurist, by profession, but a gallant naval officer (*Lieutenant de Vaisseau*; *Chevalier de la Légion d'Honneur*), it is surprising that his treatise should exhibit so much information; not only in his own practical department of the profession, but likewise so extensive an acquaintance with the rules of Maritime International Law during war, especially as professed by France when he wrote. And certainly a general acquaintance with the leading, just, and impartial principles of that science, as recognised by the European nations, is highly desirable in naval commanders, often entrusted with the performance of important services, where material collisions of interests may frequently occur, and where sound discretion is so necessary. The work of M. Ortolan, too, is, with some exceptions, well arranged, and, for such a subject, written in a simple, neat, and even elegant style; and he marshals the arguments he brings forward in favour of the cause he supports with such art, skill, and adroitness, as to approach to the astuteness which is usually only acquired from experience, and in advanced age.

<sup>1</sup> *Revue de Législation*, 1845, vol. i. p. 129. vol. iii. p. 522.

After apparently concurring in the division, now generally adopted, of positive or established International Law into two distinct parts, viz., Common Consuetudinary and Conventional, M. Ortolan thus proceeds to state the objections to the Common Consuetudinary Law of Nations, as before expounded by us. "But the principal difficulty consists in determining when and how the rules of Common Consuetudinary International Law here alluded to have been confirmed by all the nations in their material relations, in such a manner as that they may be collected and united in a sort of code, *unwritten*, obligatory on all; to what extent they may have been recognised and adopted in practice; and whether that adoption has always been, and still is, sufficiently general, that it may be said that each of them, considered separately, makes part of the whole of the Common International Law, positive and consuetudinary."<sup>1</sup>

Now the objection here stated to the General Common Consuetudinary Law of nations, in the modern sense of the *Jus Gentium*, on account of the difficulty of ascertaining it (which is not quite consistent with M. Ortolan's own previously propounded doctrine of reason and custom forming two of the three sources of International Law), obviously also proceeds on the groundless and gratuitous assumption that *human consent*, or agreement, is necessary to create human legal obligation, such as to justify or authorise coercion or compulsion by physical force. And while it thus goes to set aside and annihilate what we have just expounded as Common Consuetudinary International Law, arising from the two sources before pointed out; viz., what constitutes the *Jus Gentium Naturale*, *necessarium*, et *primarium*; and the *Jus Gentium Secundarium*, recognised by Grotius, Rachel, Leibnitz, Wolff, and Vattel, obviously omits, overlooks, and *keeps out of view*, as we have seen, various important facts and events in the human constitution, corporeal and mental, in the local position on this planet, of mankind, when united into communities or states, and in the progress of mankind in civilisation, both in their internal, political, criminal, and

civil institutions and arrangements, and also in their external mutual intercourse or communication, without the intervention of any joint consent or agreement; which facts and events are ascertained by observation and experience, and attested by the authentic records of history.

The difficulty, it is first said, consists in determining “*when and how* the rules alluded to (*viz.*, the rules of General or Common Consuetudinary International Law) have been confirmed by all nations, in their mutual relations, in such a manner that they can be collected and united into a sort of code, unwritten, but obligatory on all.” And if there be here meant the *time* and *mode* of a simultaneous compact among all nations, fixing the rules of their reciprocal conduct, in all their mutual relations, we admit the difficulty is great. Nay, more, we at once admit, that of such a confirmative compact, no evidence has yet been produced or is likely to be discovered; and that, if alleged, it is a mere fiction, like the original state of nature, and the social contract imagined by Hobbes and Rousseau.

But happily General Common Consuetudinary International Law does not rest upon any such fictitious confirmation by all nations. It rests, as we have already explained, upon higher authority than even the consent of nations given in public treaties. Indeed, consent in treaties is a very unstable basis for justice, legal right, or obligation. *Volenti non fit injuria* is a very questionable maxim even in particular, established, internal systems of law; and consent, in treaties of peace especially, is frequently a compulsory assent — a submission to what is unequal and unjust, in consequence of one of the parties having been unsuccessful in the preceding war.

In discovering, ascertaining, and methodically arranging all the rules of compulsory justice — all the rights and obligations which compose this General Common Consuetudinary Law of Nations, there is, no doubt, considerable difficulty. But this difficulty is, by no means, insurmountable, or nearly so great as the difficulties which have been encountered and surmounted in the mathematical, mechanical, astronomical, and chemical sciences. Indeed, a great many of the rules of right,

as already observed, are simple and obvious, almost intuitively perceived and apprehended, and almost instinctively felt by mankind. No collections of treaties or commentaries of diplomatists are requisite to teach a nation the right of self-defence and resistance to aggression in almost any shape. And in the progressive advancement of mankind, in the accumulation of information, in the course of experience, transmitted from age to age, and the acquisition of greater skill from habit, this branch of human knowledge, like the other sciences, becomes more complete.

While, therefore, any expectation of discovering evidence of the existence of any simultaneous compact among nations, either original or confirmatory, determining the rules of International Law, is futile and absurd, it follows that the absence of any such simultaneous compact constitutes no better objection to the existence and validity of Common Consuetudinary International Law than the absence of the imaginary Social Contract of Rousseau does to the existence and validity of the Internal Common Law of States, or private civil jurisprudence, originating and unfolding itself progressively in the manner so ably explained by Savigny. And in the preceding observations, we trust we have shown that the rights and obligations which constitute the Common Consuetudinary Law of Nations are derived from sources equally high, anterior to, and independent of, any formal international stipulation or agreement.

But in the latter part of the critical objection before recited, there is further urged the great "difficulty of determining to what extent they (the rules of Common Consuetudinary International Law) have been recognised and adopted in practice, and whether that adoption has always been, and still is, sufficiently general, that it may be said that each of them, considered separately, makes part of the whole of the Common International Law, positive and consuetudinary."

Now with regard to the propriety and correctness of the application to Consuetudinary International Law of the term "common," we defer our answer, till we come to the passage where the objection is more fully brought forward. And

with regard to the extent of the adoption, here represented as so difficult to discover, this is very manifestly a matter of fact, and must, of course, be ascertained by the best evidence to be had. And certainly, the recognition and adoption of this Common Consuetudinary Law, so far as not arising from and founded on previously existing juridical relations, in nature, fact, or actual event, are not to be presumed against any nation on slight grounds or defective evidence. From the generally scanty and defective historical records transmitted to us down to the last two or three centuries, it may often be difficult to arrive, in this investigation, at absolute certainty. But, here again, the difficulties are much exaggerated, and are by no means insurmountable. Greater difficulties have been overcome in the other sciences, dependent on the physical laws of nature, on facts, or events. The records of the Common Consuetudinary Law of Nations are, at least, equal to the records of the *Jus Pactitium*, or Conventional Law of Nations; indeed, in one respect, as formerly noticed, superior, inasmuch as the latter only show what nations have promised or agreed to do in future, whereas the former prove what they have actually done or established in their own institutions. Their own internal establishments, their own internal laws and customs, manifestly afford valid, and, indeed, incontestible evidence against nations, with reference to their own conduct and practice. And the evidence so afforded we found to be of the following kinds and degrees:—1. The legislative enactments of the sovereign power, and the regulations, or orders, of the executive or administrative government. 2. The decisions of the judicial tribunals of a nation, as recorded in the reports of these decisions. 3. The writings of the jurists or lawyers of a nation, so far as they record the legislative, administrative, and judicial regulations, and the judicial determinations of the courts of their own country, and also so far as they record the practice of their own and other nations, during their own age. Of course it is only so far as the national conduct or practice, proved in these different ways, affects foreign states or their subjects, that it is relevant in the discussions of International Law; and it is only in this view that the records referred to are competent

evidence. But, doubtless, the English admiralty and prize statutes, orders by the King in Council, admiralty and maritime prize regulations, the reports of the decisions of the Maritime and other Courts, and the writings of distinguished lawyers, such as Sir Leoline Jenkins, Molloy, Abbott, and Lord Tenterden, afford competent evidence of the conduct and practice of England, just as the French Royal Ordonnances, Edits and Règlements, the Imperial Decrees, the Décisions du Conseil des Prises, and the writings of French eminent lawyers, such as Valin, Emérigon, Pothier, Bouchaud, Guischard, and Dufriche-Foulaines, afford competent evidence of the conduct or practice of France; and no nation or government, it is manifest, is entitled to complain of being judged by such evidence.

M. Ortolan further thus proceeds in stating the objections urged against the validity of Common Consuetudinary International Law<sup>1</sup>: —

“ Since the conformation and maintenance of these consuetudinary rules depend on the progress of each epoch, they are susceptible of undergoing modifications in proportion to the extension of civilisation, and in proportion to the transformation which the succession of times brings about in the views, in the wants, and in the relations of nations. It is possible that some of them may have been practised uniformly at a very distant epoch. Not only is that possible: it is true. It is ascertained by the ancient documents which have reached us, as far, at least, as such certainty can exist, regard being had to the obscurity of a past imperfectly known. But if, in the interval which has elapsed since the starting point to our days, the greater part of nations have been seen to depart often from these rules, especially if they have been seen to proclaim, and adopt with a common accord, other rules quite opposite, it can no longer be said of the ancient usages that they make a part of the Common Consuetudinary Law of Nations. \* \* \* \* To set up such a pretension is to give to superannuated customs, which have ceased to be in consistency with the knowledge or enlightened views

<sup>1</sup> Règles Internationales de la Mer., vol. ii. p. 438.

of the present age, an imperishable effect; it is to wish to arrest and be the enemy of all progress."

Now certainly we are well aware, and did not require to be told, that positive or established International Law is liable to change, like all other human institutions and affairs, and is not stationary, but susceptible of advancement, like the internal Law of Nations, both private and public, or constitutional. And we have no wish or intention whatever to throw any obstacle in the way of the progressive amendment of Common Consuetudinary International Law, provided the change be really an improvement for all, provided it operates equally and fairly for and against all nations, provided it be just, reciprocal, and consistent with the independence and equality of nations, in point of right; not partial, in favour of some, and detrimental to others.

But as the preceding argument is plausible, artfully conceived, and calculated to mislead general readers not well acquainted with the facts and events of modern history in this department, it becomes necessary to examine it carefully. As M. Ortolan, however, selects, as an instance for the illustration of his argument against Consuetudinary International Law, the question whether the original rule of that law, by which the belligerent was held entitled to capture the property of the enemy on the open seas, although carried in a neutral vessel, and the rule recently attempted to be established, by which the neutral flag is held to protect the goods of an enemy from capture, and as this question not only involves a discussion of historical fact, as well as law, but belongs to a particular department of International Law, it may be better to reserve the special discussion of the facts for an article in which the truth may be thoroughly investigated and ascertained, and here merely to consider the general objections to the nature of Common Consuetudinary International Law before urged.

In the first place, then, while he admits (as, indeed, could not be denied) that "some of the consuetudinary rules of International Law were uniformly practised at very remote periods or epochs, at least as far back as the ancient documents which have reached us afford certainty," M. Ortolan



and his learned friends at the same time endeavour to depreciate the evidence of these ancient documents by representing them as obscure, by adding the terms, "considering the obscurity of a past imperfectly known." And certainly we should never think of attempting to prove the present Consuetudinary International Law by documents so ancient as the 12th, 13th, or 14th centuries. But we do no such thing. While M. Ortolan increases, if he does not create, the obscurity which he objects, by keeping out of view all the subsequent clear evidence afforded by the internal statutes or legislative enactments of states, ordinances, proclamations, edicts, judicial determinations, writings of international jurists or national lawyers, and even by treaties themselves, which some nations, particularly the Dutch, found generally necessary in order to set aside the then existing practice, and which, while they lasted, formed so many exceptions to the then existing general rule of law.

In the next place, it is objected generally, that the original or more ancient rules of International Law have been very often departed from, so frequently as materially to affect, if not to do away entirely, their obligatory validity. And as this objection to the nature of Consuetudinary Law involves a matter of fact, its truth may, of course, be ascertained by an investigation of the authentic historical records before referred to. But as the instance selected by M. Ortolan of an ancient rule of Consuetudinary International Law is that of a rule or practice in a particular department of that law, namely, the maritime department during war, it may be better also to reserve the investigation of the truth of the assertion with regard to this particular rule for the separate article before alluded to; and confine our inquiry here to the general objection to International Consuetudinary Law.

Now, in this general point of view, it is plain that any ancient rule of that law may have been, or may be, in possibility, departed from, either generally by civilised nations separately of their own authority, and in common but without the intervention of the consent of others, actually adopting a different rule; or partially and for a time by a special compact between or among two or more contracting states,

agreeing, by treaty, to adopt such a different rule. With regard to the first of these modes of alteration and modification, it is equally plain the fact can only be ascertained by a thorough examination, not merely of conventional treaties, and of what are called diplomatic documents or treaties of jurists, or other historical documents, recording external intercourse and international usages, but also of the records of the internal institutions, statutes, legislative enactments, ordinances, judicial determinations of different states, including the writings of their lawyers, whether national or international. And with regard to the second mode of alteration or modification, if it is here merely meant that certain rules of ancient Consuetudinary International Law were subsequently departed from and altered, by and to the extent of the stipulations in certain treaties concluded among different nations during the two last centuries and the present, we have no occasion to enter into any argument on the point: for we never doubted or called in question the title of two or more independent states to modify, by contract, their mutual intercourse, whether in peace or war, provided they did not interfere with the rights of other nations, or their title to concede and surrender almost all, though perhaps not all, their rights. As little did we ever think of disputing the authenticity of the treaties concluded among the European nations during the two last, or present centuries, or their validity, as establishing the legal rights and obligations of the contracting parties, to the full extent of a sound and fair construction of the terms employed, and for the periods of duration, either expressed or implied in the treaties, or determined by other legal considerations or supervening events. But beyond these admissions, we denied, and still dispute, the legal validity of such treaties, either to bind nations who have not been parties to them, or to bind the contracting parties beyond the extent or duration of the treaties, or beyond this extent and duration to do away or supersede General Common Consuetudinary International Law, resulting from the common constitution of mankind congregated into nations, from the circumstances in which they are placed, and from their previous unilateral acts, habits, and customs, the

uniformity of which for ages indicates the consciousness and conviction of the people of their legality. To show that the pre-existing law was superseded generally by such treaties, it is manifestly necessary to prove, not only that these treaties were observed, which (for argument's sake) we shall concede, but also that these contracting nations adopted the same practice with reference to the other European nations with whom they did not contract. But this has not been proved; and the reverse may generally be proved by authentic evidence of the subsequent conduct of these contracting parties to these other nations.

As they could not legally, so the treaties of the 17th and 18th centuries before referred to, did not de facto, supersede the pre-existing International Law, or nullify it, or render it inoperative with regard to other nations not included in the treaties. These treaties merely constituted exceptions from the pre-existing general rule; and this appears both from the terms of the treaties themselves, when deliberately considered, and is also proved by the documentary evidence in existence, of the internal legislation and administration, and practice of the contracting parties, with regard to nations not included in the treaties, and by the testimonies of their own distinguished lawyers, stating the practice of their respective countries, such as the Chevalier d'Abreu with respect to Spain, and Valin and Bouchaud with respect to France.

In the third place, M. Ortolan, with regard to the original or ancient rule of Consuetudinary Law, which he has selected for discussion, maintains that by the almost unanimous consent of the European nations, as expressed in the proposals, proclamations, treaties, and accessions to treaties, to which the appellation has been given of the armed neutrality, the original rule was abandoned, and the opposite one adopted; and that this general accord of the great majority of the European nations ought to be held binding upon the small minority who declined the proposal, and chose to abide by the long established rule. That this mixed argument of fact and law is supported by exaggerated narration, and is destitute of foundation in law, has been and may probably again be shown. But as it relates to a rule in a particular department

of International Law, namely, Maritime International Law during war, it may be better, as formerly, to reserve any farther remarks on this point for a separate article.

In addition to, and immediately after the passage before quoted in part and referred to, M. Ortolan thus concludes his attack on Common Consuetudinary International Law, vol. ii. p. 439. : " With respect to rules (*règles internationales*) thus changed or modified, in spite of the antiquity of the origin of these rules, perhaps in consequence of that antiquity, and notwithstanding the long space of time during which they have been followed, Consuetudinary International Law cannot be called Common ; for the word 'common' signifies followed by all ; it becomes doubtful, vague, and insufficient. The means of obviating this vagueness and this insufficiency, is to have recourse to the law which nations have made for themselves, by the express and often renewed stipulations of their written conventions, that is to say, to the positive conventional law resulting from public treaties."

In this paragraph two positions appear to be maintained ; that the rules of International Law, being liable to change or modifications, cannot be called "common," because they are not followed by all nations ; and notwithstanding, or in consequence of their antiquity, become in the course of time doubtful, vague, and insufficient, for obviating which the only resource is the positive conventional law, which, by treaties, nations have made for themselves. Whether, and how far treaties, denominated Positive Conventional Law, afford a solid basis for all other International Law, we have already so far seen, and will inquire more particularly in the next article. At present we shall confine ourselves to the observation that Consuetudinary International Law, being liable to change or modification, cannot be called Common, because it is not followed by all : and, no doubt, if by all be meant all the nations, tribes, and communities dispersed over the surface of this globe, in Asia and Africa, as well as in Europe and America, the consuetudinary law of nations cannot be said to be followed by all. But if, as usual, we limit the term "all" to civilised nations, those of Christendom, the European nations, and those who have emanated from them

and now occupy America, we may, with sufficient propriety, say that Consuetudinary International Law, by which we mean not only the natural, but the positive, as the Germans call it, or the established, recognised, and practised law of nations, in being common to them all, resembles the internal common law of a people, at least more so than any other international law arising from treaties or conventions: and here we allude not merely to those more humane rules of the law of nations which have been introduced in modern Europe through the mild influence of Christianity, as so well explained by the late Mr. Robert Plumer Ward in his "History of the Law of Nations, anterior to Grotius," by Principal Robertson and other historians, such as the sparing of life on the surrender of arms, the non-reduction of prisoners of war into slavery, the abolition of the use of poisoned weapons, the good treatment and frequent exchange of prisoners of war, &c. We allude also to some later improvements, such as the abolition of paper blockades, at one time resorted to by Holland and England against the aggressive policy of Louis XIV., but abandoned upon neutral remonstrances; or as the unjust, but long persevered in practice of the French and Spanish governments, in confiscating neutral vessels because they carried hostile goods, and neutral goods because they were carried in hostile vessels. No dubiety, vagueness, or insufficiency arose from these changes and modifications, notwithstanding or in consequence of the antiquity of the customary rule which came to be observed.

With regard, again, to the propriety and correctness of the application to Consuetudinary International Law of the term "common," here disputed by M. Ortolan, we apprehend he mistakes the meaning of the term both in the ancient and modern languages of Europe, limiting it to what is effected through a simultaneous or contemporaneous joint agreement, or union of consent; whereas the term implies also, if not its essential, its chief and ordinary signification, as predicated of law, rules, or courses of conduct, identical or similar, separately followed or adopted by different individuals in civil society, or by nations, whether contemporaneously or in succession by different generations. The *jus gentium* of the

Romans, as contrasted with their peculiar *jus civile*, was the common law of mankind advanced to a certain degree in civilisation, although not emanating from any joint or simultaneous agreement. The rights and obligations which we formerly enumerated, chiefly constitute the *jus gentium inter civitates*, *primarium et secundarium*; and that law is called *Comitum*, from being common to, and as having been usually followed by, if not all nations, barbarous and civilised, at least by all the civilised European nations and those emanating from them, and from the same or a similar description of unilateral acts, though performed separately and independently, having been uniformly performed by these different nations in common.

Farther, for the propriety of the application of the appellation "common" to General Consuetudinary and Non-conventional Law, we may even appeal to the authority of one of the ablest French jurists of the present century, in speaking of whose work, M. Dupin says, "It is a great advantage to have the power of benefiting by the meditations of a man whom long practice has enlightened; we have this advantage in the possession of the book of M. Gerard de Rayneval; he has always been attached to foreign affairs and to French diplomacy." Thus says M. de Rayneval: "I cannot cease to repeat, treaties (their contents are of no importance) do not constitute the law of nations; they are the expression of the particular will of the contracting parties, and the law of nations is independent of that will; they are of the same nature as contracts between individuals; but in the absence of any contract, it is the 'common law' which decides; and between, or among nations; the *common law* is the *law of nations*, *le droit de gens*."

#### ART. IV. — THE COMPULSORY ENFRANCHISEMENT OF COPYHOLDS.

1. *Copy of the Sixth Report of the Copyhold Commissioners to Her Majesty's principal Secretary of State for the Home Department, pursuant to the Act 4 & 5 Vict. c. 35.*
2. *A Bill intituled "An Act to extend the Acts for the Commutation of Manorial Rights, for facilitating the Enfranchisement of Lands, and for the Improvement of Copyhold and Customary Tenures," presented 2d June, 1848. Amended in Committee and reprinted 17th July, 1848.*

THERE is scarcely a point on which the profession has so long and so completely made up its mind as that of the Enfranchisement of Copyholds. That dislike to the dregs of the feudal system which, according to M. Guizot<sup>1</sup>, exists in the mass of the people, as well in France as in England (and we may add nearly all over Europe), has to this extent at least pervaded the legal mind; and although the conveyancer may yet delight in the idea of the freehold being full, or the pleader still admire the *dramatis personæ* of the action of ejectment, yet they join in detesting copyholds, root and branch. Not even the writing a book on the subject can inoculate its author with even a leaning in its favour; and our readers will remember that Mr. Watkins concludes his learned treatise on this subject by denouncing the whole body of law which he had so laboriously explained. "A system of jurisprudence," he exclaims<sup>2</sup>, "cannot remain perfectly the same while the manners of nations change. The principles which originate in barbarism cannot meet the wants of an improved and refining age. The principles of nature are

<sup>1</sup> "Feudal despotism has always been repulsive and odious. It has oppressed the destinies, but never reigned over men. Hence, I conceive, the truly prodigious and invincible hatred with which the people of all times have regarded the feudal system, its recollection, its very name." (*Guizot's History of Civilization*, as translated by Hazlitt, vol. i. p. 73.)

<sup>2</sup> *Treat. on Cop.* 161, 4th ed.

fixed and immutable, and laws founded on those principles will always apply: but laws founded on arbitrary impositions, or the peculiar manners or necessities of a particular age, should not be permitted to shoulder out common sense from society, or incumber the conduct of persons to whom they cannot in reason relate. The prejudices of the ignorant, and the opposition and arts of the interested, must be expected and met; but we should meet them with manly firmness while conscious of the integrity of our views. We should recollect that we cannot reason from a matter of fact to a matter of right, and that it does not follow of necessity that because absurdities and inconveniences exist, they therefore ought to be cherished."

This, it must be confessed, is pretty strong for an author who thus, regardless of further editions, gave up his own bowels to the knife of the law reformer. But the witnesses before the Real Property Commissioners, chiefly belonging to the same class of the profession as Mr. Watkins, and best acquainted with the subject, overflow with similar language, and lift up their almost united testimony against the copyhold system. We shall not think it, therefore, so necessary to dwell on its general defects and disadvantages as to mention the steps recently taken to get rid of them; and here the legislature has shown all that care and caution which is so necessary in dealing even with the most faded and putrescent rights affecting the law of property. The main principles of the scheme for gradually abolishing this tenure, were laid down by the Select Committee of the House of Commons in 1838, of which the most prominent members were Sir Robert Peel and Lord Campbell. This committee came to the following conclusions:—"That it is the opinion of this committee that encouragement and facility should be given for effecting, by a voluntary agreement of the parties interested, the enfranchisement of lands held by copyhold and customary tenure, and for the commutation of heriots. 2. That such encouragement and facilities should continue only for a time to be limited. 3. That the attempts to effect such voluntary agreement should be made under the superintendence of the Commissioners for Tithe Commutation.



4. That it is expedient that provision should be made by the legislature for carrying into effect, in the event of the failure of voluntary agreements, a compulsory arrangement for the enfranchisement of copyholds and commutation of heriots on such a basis as may appear, according to the circumstances of each case, most equitable, so far as regards the interests of all parties affected, such compulsory settlement to take place immediately after the expiration of the period granted for the purpose of making a voluntary agreement." The same committee subsequently made a Report, in which they entered rather more fully into the subject, and ended by recommending that facilities for enfranchisement should be given for a short term of years, and that after that period the enfranchisement should proceed on the compulsory principle; and they recommended that a bill, having this object, should be introduced in the next session. This bill was accordingly introduced by Mr. James Stewart, was supported by the Whig government of that day and the great majority of the Conservatives, and, after some delay, and certain changes and vicissitudes, became the act 4 & 5 Vict. c. 35., the provisions of which have been subsequently extended.<sup>1</sup>

By these acts, the Tithe Commissioners, according to the recommendation of the Report, are constituted "Copyhold Commissioners" for a limited period, which has been twice extended<sup>2</sup>, and are entrusted with powers for carrying the act into effect. It provides two modes of remedying the evils now affecting the copyhold tenure. By the first of these, the burdensome incidents affecting it, as fines, quit-rents, and heriots, may be commuted for a corn rent-charge, leaving the tenure untouched; and here, the lord consenting, three-fourths of the tenants of any manor in number and value, may bind the remaining fourth at a meeting to be called for that purpose; and, secondly, great facilities are given to enfranchisement. 1. By allowing all lords, whatever may be their interest in the manor, to enfranchise, duly protecting the rights of the remainder-man; 2. by relieving

<sup>1</sup> 6 & 7 Vict. c. 23. 7 & 8 Vict. c. 55.

<sup>2</sup> The last act for extension is the 10 & 11 Vict. c. 101.

some of the proceedings under the act from stamp duty ; and, 3. by allowing parties, where six or more tenants agree, to enfranchise by way of schedule — a simple and concise form, which, if the parties agree as to terms, is the only document required, and completes the transaction.

This measure was taken by the friends of copyhold enfranchisement not only as affording all the relief that the legislature would at that time give, but as greatly furthering a more complete measure, by carrying into effect the resolutions of the Select Committee of 1838, to a certain extent, and adopting thus far the opinions contained in the Report. The Copyhold Commission is a tribunal adapted (until a better be found) for dealing with this subject, and for adjusting the rights of all parties. The act, also, it is to be remembered, admits the principle of compulsion so far as *commutation* is concerned, although not to a great extent, and certainly not to so great an extent as many eminent persons consider to be perfectly compatible with justice and safety.

Since this act, no doubt, a good deal has been done towards the enfranchisement of copyholds. The Reports of the Commissioners particularise what has been accomplished under their immediate superintendence, which is considerable ; but these Reports have also assisted others who were willing to enfranchise on fair terms, and who had power to enfranchise independent of the Copyhold Act ; and we cannot doubt that a blow has thus been given to the copyhold system. It is also to be observed that, under the railway acts, compulsory powers have been always given to obtain enfranchisement from the lords, and these have been inserted as applicable generally to all future undertakings in the Lands Clauses Consolidation Act, 1845.<sup>1</sup> Similar powers have been obtained for certain special purposes ; as to the Poor Law Commission, the Church Building Commission, and some others. Still, allowing all this, there can be no doubt that we have, as yet, scotched the snake not killed it, and considering the whole mass of copyhold property in England, little impression has yet been made ; and it is to be remembered that all the

<sup>1</sup> 8 Vict. c. 18. ss. 95—98., and see *antè*, p. 125.

most harsh and grievous cases remain entirely untouched, because in them the lord refuses to listen to any terms, or demands those only which cannot be given.

The almost universal feeling now exists that the time is come when further steps should be taken for the entire extinction of the tenure, and that, to use the language of the Committee of 1838, "the compulsory principle must be introduced." Before, however, we allude to the steps which have been taken to accomplish this object, we think that our readers may be interested by some extracts from certain letters with which we have been favoured. These documents, all of very recent date, consist of statements of the actual wants and wishes of parties now interested in copyholds, and are expressed of course in their own language. We do not think we are called upon to give the names either of the parties who have written them, or of those to whom they have been addressed. We only think it necessary to say, that they are real statements, made by various parties interested in the matter. But we do not profess to give them on any authority, except the character which this Review may have acquired as a medium of accurate information. Without further introduction, therefore, we shall make these extracts, and let our readers take them for what they consider them to be worth. They will explain, as it appears to us, the real pressure of the case.

*I. As to the necessity of a compulsory measure of enfranchisement.*

"Although a measure for the commutation of copyholds might prove in operation some mitigation of the present obnoxious system to which we are exposed, and especially so from the stewards of the manors by their unreasonable fees and unfair charges, yet as the property would still be left liable to perpetual contingent variation, our determination is to remain as we are, without incurring additional expenses, if nothing more permanent can be effected.

"On the other hand, we are unanimous in coming to the conclusion to make every equitable effort in our power to enfranchise our lands if possible, as by this means, by paying a fixed sum of money at once, all future fines and fees, as well as many other objections, would be done away; the tenure of our property be

rendered much more desirable to ourselves, and its relative value much improved to our families. Under these circumstances, we are desirous to make an attempt at enfranchisement of our copyhold lands, &c., but as the feeling of the lords of the manors here, and their stewards, are evidently against such a step, and as the recent act of parliament seems to us to leave it *entirely optional on the part of the lord of the manor*, we do not anticipate we shall be able to do anything."

The following letter was afterwards received from the writer of the above: —

"I think it right, from the kindness you have shown in your late communication with myself, to inform you that all our attempts to effect an enfranchisement of our copyhold premises and lands in the manors in this parish are in vain, as the lords and *stewards* of the manors, and *particularly the latter*, have set their faces decidedly against it, and will not even attend a meeting to hear any proposals that might be made.

"The Copyhold Enfranchisement Act, therefore, here gives us no relief whatever from the present unjust system of fines and fees to which we are exposed in every circumstance connected with our copyhold property; and it is so much the more to be regretted at this time, as a large enclosure from the sea is now taking place in this parish, and as all our allotments under it will be of the same tenure as the tofts and messuages from which they will be derived, we have nothing to look forward to but the same kind of treatment and payment of heavy expenses which we have met with in time past; and unless the enfranchisement clauses of the act are made by parliament, like the commutation ones, compulsory on the lords of manors, the country will derive no real benefit from the present act. We sincerely trust, however, some steps will be taken by parliament in the ensuing session, for this desirable purpose."

Another letter to the same effect: —

"I cannot help regretting that the legislature does not, in certain cases, make it imperative on lords of manors to enfranchise. I have copyholds subject only to a fine *certain* of a few *shillings* and a quit rent of a few *pence*, full of brick earth and gravel; the lord will neither give me license to dig for either nor enfranchise, *because* he has land of *his own* from which he is selling brick earth and gravel, therefore locking up my land and keeping it at the value of 100*l.* an acre, whereas, if it were en-

franchised, it would be worth 500*l.* an acre! I am ready to prove the facts."

Another to the same effect: —

"I am a large holder of copyhold property in ———, and, with many other copyhold tenants of the manors in this parish, am very desirous of making our lands and tenements freehold, if possible, upon any fair terms of redemption or purchase, but the lord will not even consent to listen to the proposal."

Another to the same effect: —

"All this town is copyhold and fine arbitrary under the Duke of ———, who it appears from his steward will not agree to enfranchise. I applied to the steward to enfranchise, but the answer I received was, the lord will not, nor is it likely that he should enfranchise a few estates only; were all the tenants to apply, it might be different. This place has considerable trade, and an enfranchisement would be highly beneficial to the town and agreeable to the people. In my opinion, nothing short of a compulsory measure will do any extensive good. I have conversed with many professional and other men, and they are all of my opinion."

Another to the same effect: —

"I am the proprietor of *thirty-one acres of copyhold land in the manor of* ———, which I purchased above fifteen years ago and have made numerous attempts to negotiate with the lords for its enfranchisement, but have never been able to succeed, as the sums asked have been so exorbitant. I am still desirous to enfranchise could it be effected at a moderate rate, but how to accomplish that end I am at a loss, as they refuse to submit to any arbitration but their own and their surveyors."

As to determination of lords not to enfranchise, and the necessity for compulsory measures: —

"In the month of July, 1845, I purchased twenty-two acres of copyhold land at ———. The lords of the manor are the Dean and Chapter of ———.

"In the following year I applied to Mr. ———, the steward, to know if the Dean and Chapter would enfranchise, as I had understood they had done so for the Earl of ———. He informed me that he thought they would, and that the application had better be made before my admission; that the Ecclesiastical Commissioners would require five years' rent, and the Dean and Chapter two (making in the whole seven); to this I assented, and wrote a letter

at the Chapter House under his dictation, addressed to them (a copy of which I did not keep), stating my desire to enfranchise and ready compliance with their terms. I received an answer to this application about a year afterwards (of which I have enclosed a copy), declining my proposal. I have subsequently been admitted and paid the usual fine, viz. one year and a half rent. Nearly the whole of ——— (a small village) is copyhold, and that tenure is a great injury to the general interests of the parish, and it requires great influence with the Dean and Chapter to induce them to enfranchise. I have none, but I am willing to pay."

Copy of the steward's letter: —

"From a communication I have just had with the Chapter clerk, I learn that the Dean and Chapter are not disposed to enter into any enfranchisement of the lands in ———. The annual court will be held on the 10th prox."

Determination of lords not to enfranchise on any terms :  
(from a lord) —

"There is no diminution in your quit rents. I do not comprehend your note about Mr. B——'s house. But I never have and never will enfranchise, or indeed grant the enfranchisement, to any copyhold property in ——— manor as long as I live.

"I remain, yours truly,

"(Signed) (lord)."

In the letter which enclosed this declaration, it was said —

"No good will ever be done here by mere voluntary measures. We would willingly give land, money, or fixed annual rent, or varying with tithe rent charge, to get rid of absolute tyranny, cheating, and extortion."

In their report for 1847, the Copyhold Commissioners say "There is a slow and gradual advancement in the voluntary enfranchisement of copyholds under ecclesiastical lords, and that it seems probable that almost the whole of such copyholds will in time disappear."

This is true to a certain extent, as we see by this report that the Archbishop of Canterbury, the Bishop of London, and others, have enfranchised a good deal, but it would seem that among the outlying deans and chapters, a *very considerable time* will at all events be required before they will move in the matter, as will be seen by a few more extracts.

Property held under the church : —

“Myself and the other copyholders in the parish, held under the Dean and Chapter of ———, being desirous to avail themselves of the act of parliament to enfranchise their copyholds, I was requested to ascertain if the Dean and Chapter were disposed to comply with our request. This I did through their steward, expressing our desire to base the negotiation upon fair, just, and equitable terms between all parties, and under the sanction of the Commissioners.

“The reply that I have received is, that the Dean and Chapter are not at present disposed to enfranchise the copyholds; and there being no compulsory clause in the act, the desire to improve the cultivation of the land is very much checked.”

The above answer was received to an individual application. The following statement was subsequently made :—

“Having before made an individual application, I now forward to you the joint signatures of *all* the holders under the church in this parish, and trusting that as far as it goes it may strengthen your hands in carrying out the very desirable object in view.”

Answer from the steward of a Dean and Chapter to an application for enfranchisement : —

“Manor of ———.

“I beg to inform you that at a meeting of the Dean and Chapter, held this day, I laid your application for enfranchisement before them, and they direct me to inform you, they see no sufficient reason *to depart from their established rule of declining to enfranchise*, and therefore they cannot comply with your request.”

In all those cases, then, in which the lord positively refuses to enfranchise, or to enfranchise only on his own terms, not only is a positive bar put upon all improvement, but a check is placed on the free transfer of land. This will, perhaps, appear more clearly from one or two more extracts : —

*Effect of the tenure on the transfer of land.*

“A small estate copyhold of the manor was offered for sale by public auction on Wednesday last, but was not sold. Since the auction, however, it would have been sold, but on applying to the lord of the manor, to inquire if he would enfranchise it, his reply was in the negative. The copyhold tenants are very much dissatisfied with the lord.”

*The effect of the present system in checking the sale of land.*

"I have purchased a property at ———. It is not transferred to me yet, and the inquiry respecting its enfranchisement was made by the party of whom I purchase, who will, in case we can come to terms with the lords for the enfranchisement, transfer it to me in the state it would then be, viz., *freehold*. The answer the vendors got was — 'We will enfranchise it for seven years' rent, at 35*l.* per year.' He said he would weigh the matter over, and see them again. He came and told me what they had said. The place, as I before stated, has been unoccupied for the last two years, during which time it has been twice offered to public competition for sale. As the price was not accepted, it had, for a considerable time, large bills put in some of the windows, — 'This house to let,' &c., but no tenant could be found, although 20*l.* per annum would have been gladly accepted. As, from conversations with the present owner, I clearly saw I had a set of men to contend with who wanted for the enfranchisement a sum not founded in justice, I determined to offer them what I know to be far above its value, namely, 210*l.*; in other words, seven years' purchase, at 30*l.*. This sum was offered, and every circumstance connected with the property clearly pointed out to them. They refused to take the offer, and upon being told it would not, under such circumstances, be redeemed, they said, 'In case it be not redeemed, we shall fix upon a purchaser the rent of 40*l.* whereon to calculate the fine.' Such conduct as this amounts to positive robbery. They appear to me to throw every obstacle in the way of any one who wishes to enfranchise on equitable terms. None will suit save and except their own; which are in all cases, so far as I learn, as extortionate as possible, and, as a consequence, makes the redemption of property very scarce. The fine at such rent would, as a matter of course, be 60*l.* I went further than above stated: I offered to give the seven years' purchase at 35*l.*, *their own terms*, say 245*l.*, if they would guarantee me a tenant for seven years, at 35*l.* per year. That they declined, as they well knew they would have a job to let it at all."

*As to preventing buildings.*

"A client of mine having copyhold land for building houses on in ———, is unable to let it to builders on account of the fine on each lease containing only one house, and the heavy expenses incurred, and the refusal of the lord to enfranchise."



II. One of the greatest hindrances to enfranchisement is, doubtless, the opposition of the stewards of manors. The lord frequently knows and cares but little about the matter, and very naturally leaves it to his professional adviser, who is in this case the steward. The Commissioners, in their report for 1847, hint at this opposing cause, but the tenants speak out more plainly.

As to the influence of the stewards: —

“I quite agree as to the public benefit which would result if the extinction of copyhold incidents were made compulsory. Indeed, it would be a good thing if all copyhold clogs on property were got rid of, and the community generally would be benefited if enfranchised in all respects, and made as freehold. Certain lawyers, being stewards, alone would suffer. As it is, it is a great drawback to such property in many respects beyond the most glaring ones.”

Another to the same effect: —

“Is there any likelihood of the legislature enacting a compulsory enfranchisement? There are many properties here that remain in a state of waste, and many of them a nuisance, for want of a better title to improve them.

“I believe the difficulty or refusal does not lay so much with the lord as doubt of compensation to the stewards; so very heavy fees, &c. continue.”

Another to the same effect: —

“Is there any power under the Copyhold Enfranchisement Act to compel the lord, provided the proprietor is ready and willing to pay fair and equitable compensation for his individual property he may seek to enfranchise? It appears to me, under our see, the bishop being lord of the manor, that all the officers would much rather have things remain as they are, than run the risk of having their offices curtailed or abolished; because I sent to the bishop's secretary, asking him whether they had contemplated or digested any plan to offer the copyholders, he never returned me any reply: therefore I say unless you can protect individuals, and, when any copyhold is changing hands, you can give the purchaser the offer of enfranchisement, fairly, few of us will like to contend with the lord. In all other districts I apprehend the same evil

will exist, spurred on by the underlings to keep things as they are."

The following letter brings a more serious charge against some particular stewards : —

" Can the copyholders compel the lord or lord-farmer to enfranchise now, whether he be so inclined or not? I know an instance or two where the lord-farmer is an attorney, and *his steward a relative and attorney also, and they are acting most vexatiously and offensively in the manor, which had become almost a dead letter, and courts only held at the instigation of copyholders*, and those few and far between ; *but now several are held in the year. All kinds of obsolete doings revived : new fees and exactions demanded, all kind of presentments at the dictation of a busy steward made and entered on the new rolls, the whole being made most oppressive and injurious to the copyhold interest in the parish. In about six months or so they will have realised the purchase-money paid by the lord-farmer to the lord (a bishop in right of his see).*"

This is an enormous grievance, and we fear there is too much reason to believe it exists to a considerable extent. A practice is prevalent of buying up manors for the express purpose of wringing out of the unfortunate tenant the very utmost farthing that can be extorted from them under any custom that can be found on the rolls. We have even heard of a club being started for the express purpose somewhere in the county of Norfolk. This is a gross abuse of the law. There is no very distinct evidence of the extent to which it has been carried, but it is notorious that there is a large class of manors called *stewards' manors*, meaning thereby manors which produce little or nothing to the lord, but are only serviceable to the steward in the way of the fees which he levies from the tenants. In these manors, of course, the fines are small and certain, and often do not pay the expense of collection.

III. Another, but more familiar, grievance is as to heriots, and we need not take up much space with what all admit should be abolished.<sup>1</sup>

<sup>1</sup> Lord Stanley admitted in the House of Lords last session, that a bill for the abolition of heriots would be opposed by no one, and the Commissioners, in

"In one case," says one of our informants, "my own, fifty yards in length of my *frontage* to my copyhold, bordering on the lane and village, and *only one pole wide* (to leave statutable width of highway), was 'granted in court,' by a set of low ignorami, *who dine at the ale-house* with the steward, without apprising me, who was visiting in Wales, and without regard to the remonstrance of another resident gentleman, whose *freehold* was *opposite*, and damaged by a stable since erected on the granted waste. I took counsel's opinion. It had so many yeas and nays, ifs and buts, in it, that I thought it best to abide by the damage (and the injury, as I think, 'damnum *non sine injuriâ*,') rather than incur the uncertain issue and certain cost of litigation. The 'taker up' of this piece of waste or easement would *now sell* to me; but I know that I should subject my estate, at my decease, to a heriot, for less than a rood of ground; and the simpleton did not know that it was made heritable (query, illegally made so?) as is the customary usage here, legal or illegal."

Another case as to heriots: —

"To show how desirable a compulsory measure would be, I mention a fact that has just occurred here. A gentleman bought an estate of my nephew, nine months ago. It was copyhold within two or three manors, though not exceeding 100 acres. The nephew, as executor, takes it up in order to sell under his father's will, lately deceased, and the purchaser (having repaired, &c.) is *now* deceased. His widow and children must go through the same expenses, but of that misfortune and *liability* I do not complain: but there was a sort of race between the respective low-minded bailiffs of the manors to mark their heriots, and get the best, as

their report for 1847, make the following statement: — "*Heriots* form one of those vexatious incidents to copyhold tenure which create a very general feeling of irritation, much greater than their average pressure warrants. The most valuable picture may be seized as a chattel heriot in respect of a copyhold tene-ment not worth 10*l*. In the case of live heriots, race-horses and other valuable animals may be seized under like circumstances. Instances of the full exercise of such rights, though rare, are not unknown. To commute these heriots into certain fixed payments, giving the lord full compensation, would be an easy and popular operation. It would only be necessary to enact that, on application by any tenant, the Copyhold Commissioners should, by such means as to them seemed fit, ascertain the value of the lord's right to a live or chattel heriot, and then establish a small fixed payment in its place, assigning to the lord such a sum of money as his abandoned right was worth. So much might be easily done, and it is not probable that a bill to effect this object alone would meet with any opposition."

soon as the death was known, and, of course, before the afflicted widow had buried her deceased husband! I do not say that the lords of these manors ordered such *indecent* haste; but the bailiffs say, and know very well, that if one has obtained 'a carriage and horses for three heriots,' and the other only 'a cow,' (or, as in a late different case, the favourite pony), the one and the other will have their reward or their blame, for attention or slackness."

IV. — *Difficulties from the state of the law.* — To show that the difficulty of ascertaining the exact state of the law relating to copyholds is not an imaginary evil, we must again have recourse to one extract: —

"I had occasion yesterday to apply to the lord of a manor in the neighbourhood of London, in which the lands are being built upon, and the question becomes most important, as to the right of widows to dower, whether it was limited as to lands of which the husband died seised. This inquiry had reference to thirty-two acres of building land, on which hundreds of thousands of pounds may be expended. The steward declined giving any certificate, but, as a matter of information, said he would mention that he believed it was limited to estates of which the husband died seised, but the rolls were open to my examination, which he said would be 'a precious job.' This shows the moral impossibility of ascertaining what is the law or custom of the manor as to estates, and the error of Parliament in confining the Dower Act to lands of freehold tenure; and that the existence of copyhold tenure is an evil of great magnitude, and requires immediate removal."

Another as to divers titles: —

"It appears in this neighbourhood that the operation of the acts is much retarded in consequence of the lands held by different titles being very much intermixed. For instance, there are several persons whose farms consist of — copyhold land held under the Dean and Chapter; leasehold held under that body; leasehold under the Bishop of ———; and their own freeholds; — scarcely any two fields of the same holding lying together. Consequently it would be of no service to enfranchise unless the lands at the same time could be divided, as was proposed by clauses 127. and 128. of the Commons' Enclosure Bill."

And here we would ask, is it not highly inconvenient and injurious to the public to have two separate codes of law relating to the real property of the kingdom; — to have one

field governed by one set of rules, and the next by another set, entirely different ; — to have one half of a house descending to one class of heirs and the other descending to another class? But this might, perhaps, be endured, if the rules of both codes were equally well defined, and as generally known and understood. But how does this stand? The rules relating to freeholds are simple and well known, or if any new point arises with respect to them, reference may be had to the Judges of the land to decide it. But with respect to copyholds nothing is certain ; “ custom is the life of copyholds,” and these customs are contained in the court rolls of the particular manor. Moreover, they are construed by the steward of the manor, who, to say nothing of his being an interested party, is certainly more liable to error than the Judges of Westminster Hall. Surely, then, looking at the law as a science, nothing can be more unsatisfactory than to have a large portion of the real property of this country governed by customs which vary with each particular manor ; to have a multitude of small parcels of land scattered throughout the country, each regulated by its own crotchets, which are construed by its own judges, and which are mixed up and dovetailed in with freeholds, so that in some places it is impossible to tell which is which. It is of the first importance that the rules of law, more especially the law relating to property, should be simple, accessible, generally known, and easily understood, and, above all things, in all parts of the country uniform. How can this object ever be obtained if the law relating to copyhold and customary tenure remain as it is?

What then are the advantages of this tenure? They are usually stated to be, greater facility of transfer, and a more easy proof of title, the Court Rolls operating as a register. These advantages are thus dwelt upon : —

“ My practical experience tells me that the present transfer, &c. is good, subject to a few improvements : it is very simple, less expensive to the parties, titles more easily investigated, and, in short, altogether more beneficial to the *parties*, than the transfer of freehold property. But desirable amendments might be made in it, principally with a view of simplifying them, and now is, I think,

the time for advancing such amendments. The record of the proceedings, that is, the Court Rolls, form, as it were, a little register office in every manor, a most important consideration in my mind. But to make this the more perfect, lords of manors should, in my opinion, be compelled to keep their court rolls in or within a reasonable distance of their manors. I had lately to send near 100 miles to search the court rolls of a manor near this town, as to a tenement of very minor value."

But something is to be said on the other side, even as to this: —

"The manor of ——— extends over 8000 acres, most of the proprietors having a portion freehold and a portion copyhold. The ——— is a manor paramount, and within it are four minor manors, the copyhold lands lying in patches at all parts of the parishes over which they extend.

"The number of copyholders in the manor of ——— exceed 150, those of the smaller manors together from 50 to 60. I find from the last particulars of the ——— Park Estate, the net quit rents amounted to 38*l.* 5*s.* 6½*d.*, and the fines (being two years' quit rent on death or alienation, and heriots on an average of the seven years preceding) 6*l.* 4*s.* per annum.

"The quit rents of the other four manors with the fines about 15*l.* per annum, taking the whole of the quit rents at 50*l.*, the average yearly payment is less than 5*s.* each, varying from ½*d.* to 5*l.*

"A brother of mine some years since purchased a small estate lying together containing 10*a.* 0*r.* 3*p.*; of this 4*a.* 3*r.* 26*p.* was freehold, and the remainder copyhold of four of the manors previously referred to. If it had been all freehold, the only addition in expense of conveyance would have been about 3*l.* in the stamp, as it was, the whole cost of transfer amounted to upwards of 60*l.*, of which sum 32*l.* was paid in stewards' fees, and the same property the trustees who sold it had been admitted to the year previous. I know a great many instances similar to this, and I have two small properties now on sale, one of six acres, part freehold and the remainder copyhold in two manors, another of four acres copyhold in two manors. There is also a great prejudice against copyhold land for building purposes, from the extra expense and the customs appurtenant to it. I know instances of 10*l.* and 15*l.* being offered to the lord to enfranchise pieces of land when the quit rent in each case was under 1*s.* per annum, and the fine two years' quit rent only, and then refused.

"For whose benefit copyholds of this nature are continued, I need not say. Perhaps you will inquire why we do not enfranchise; to which I reply, because the act does not empower a majority or any other proportion to demand it. Half the manors in this part are in entail, settlement, or some restriction, and *the stewards will not move.*"

V. Another very great grievance, although usually of a minor kind, connected with this tenure, is the law relative to forfeiture. If this law were acted on with any strictness, it would be intolerable. Let any one look at the causes of forfeiture as recorded by Mr. Stalman in his useful edition of Serjeant Scriven's book, and he will see the barbarous and absurd state of this branch of the law. A forfeiture of the tenant lands is incurred for neglecting to attend a court after a *personal* summons; for withholding *services*; for removing an ancient land-mark, and on a thousand other pretexts (ridiculous if enforced by a penalty of this extent), according to the custom of the particular manor. It has come very recently to our knowledge, that in three different manors the following customs exist at the present day: that every copyholder shall attend personally on the ancient court day (a very usual custom); that no copyholder shall marry his daughter without the consent of the lord (the vestige of a more serious right); and that no copyholder shall depart out of the boundaries of the manor without the like consent. And in case of any want of observance of these customs, a forfeiture follows. We are told at the same time that these customs, although in full force, are not acted on; but is it not obvious that, in the hands, not indeed of the lord, or even of the steward, but in the hands of the bailiff and other underlings, they may be made an instrument of oppression and tyranny to many persons, especially of the poorer class.

Under what reasonable pretext, then, can the lords resist an enfranchisement, if fair terms be offered to them? We cannot suppose that they can wish the preservation of these relics of a bygone time from any desire to exercise an influence arising from what appears to us so unworthy a source. Now let us see how far it is possible to ascertain fair terms. The Commissioners show in their reports that they are en-

abled to deal satisfactorily with the cases that come before them. In the fourth Report they say, "We are enabled to settle the cases that are brought before us both cheaply and expeditiously; nor have we any difficulty in arranging the terms of enfranchisement when there is a fair disposition in parties to effect them." They further say, "We have also reason to believe that the terms we have laid down in enfranchisements, which have passed through this office, have been adopted in similar cases by other persons, who have not found it necessary to come to us, being either seised in fee, or having power to enfranchise." There is, therefore, an impartial tribunal capable of adjusting the rights of all parties.

Let us see then, setting aside all prepossession in favour of feudal lordship, how the question stands as a matter of property. Let us see whether the lord's rights cannot be fairly valued; and here we shall avail ourselves of the observations of a recent writer, practically acquainted with the subject: —

"However easy the copyhold burdens may be, as, for instance, small fixed fines and nominal quit rents, the lands subject to them almost invariably fetch less money in the market than freeholds in the same neighbourhood. The difference is often as much as two years' value; but it is something in every instance that has come to my knowledge. In these cases, it is to be remembered, that the profit resulting to the lord from copyholds of this kind is very inadequate. Very often these quit rents are hardly worth the expense of collecting. In cases so circumstanced, an enfranchisement would greatly benefit the tenant, because it would at once enhance the value of his land, by giving him the difference between it and freehold in the market; and it would take scarcely anything from the lord's profits.

"Again, take the case of heriots. This is an incident which is often extremely vexatious and troublesome to the tenant, but is by no means adequately remunerative to the lord. The payment is constantly evaded. It should be the best beast or the best chattel of which the tenant dies possessed; but the latter is aware of this circumstance, and by one contrivance or other he manages to hand over on his death a very sorry beast<sup>1</sup> or a very indifferent chattel.

<sup>1</sup> This does not, however, always happen. The well known race horse, *Non-sense*, was seized as a heriot very recently, thus sharing the fate of *Smolensko* and *Wazy*.



The feelings and temper of the times are against the payment, and the tenant thus justifies himself in baulking the lord of his legal rights. On this point I will venture to appeal to the experience of nine lords out of ten, whether the right to heriots is not often more trouble than profit, and whether, in fact, he now receives any thing like his fair claim. Here, then, enfranchisement might safely proceed to the advantage of all parties.

“But with respect to arbitrary fines, which are, in fact, the great source of profit to the lord, greater difficulties present themselves. These are usually rigorously exacted; more rigorously than ever, as I have been informed, since the passing of the recent act; and undoubtedly an enfranchisement from them, which is a great boon to the tenant, should only be made on a full equivalent to the lord, and the reasonable probabilities of improvement should enter into the consideration. These fines are undoubtedly, so far as the community at large is concerned, the most objectionable feature of the tenure. Here there can be no evasion. The fine is determined by the value of the land on the death of the tenant, or its alienation, or sometimes its mortgage in his lifetime; and in some of the northern counties, a further fine is payable on the death of the lord. It is obvious, under these circumstances, that the enjoyment of the land, and its free alienation, is thus greatly hindered and embarrassed.”

What then is to be done to give some fresh impulse to the enfranchisement of copyholds? The first idea is, why not abolish the tenure altogether? This may seem an easy matter; but let us hear what the Commissioners, who are acquainted with all the difficulties of the case, say as to this:—

“We do not dwell on the scheme of a complete and compulsory enfranchisement of all the copyhold estates in the kingdom. We have great doubts if it would be found practicable to pass such a measure. We have no doubt at all that if it passed, the difficulties and expense of its application to the whole kingdom, and some serious local difficulties of detail, would be found insuperable obstacles to the completion of this scheme.” (6th Report.)

The great difficulties arise, we apprehend, from the compelling *payment* from all tenants indiscriminately, as well those who do not want to enfranchise as those who do. Considering that settlements are made of most real properties of

any extent, many tenants, as well as most lords, are only tenants for life; and although it may be reasonable and in accordance with numerous precedents to compel the lord to *receive* the compensation for enfranchisement, yet it is another thing to compel a person to *pay* for what he says he does not want.

Having all these considerations in view, the Lord Chancellor brought in a bill at a late period of last session, which enabled any tenant to obtain a commutation of the copyhold incidents on paying the proper consideration, to be settled by the Copyhold Commissioners. This bill, in committee, was considerably amended, and its provisions greatly extended. It was then reprinted; and as it now stands is well worthy of consideration, as going far to remedy the real grievances affecting this subject. On the application of either lord or tenant, the Commissioners may make an order of enfranchisement; and on that a valuation of the incidents of the manor is to take place; and in this valuation the probable increase of value by enfranchisement is to be taken into account. By s. 30. power is given to the Commissioners, "in any case when they shall be of opinion that a present increase of payment in the way of rent-charge or interest would create hardship or inconvenience to such of the tenants of a manor as shall not have been applicants for the order of enfranchisement, to defer the payment." An award is then to be made which is to operate as a conveyance of the enfranchised land. Another important provision is that for the fixing and taxing stewards' fees. This bill was not printed until the 17th of July, and could not be proceeded with in the last session. The only division which took place on the principle of a compulsory measure showed a majority of two to one in its favour. We believe there is no doubt that this bill, or some similar one, will be renewed in the ensuing session, and we have the most sanguine opinion both of its success and the benefit which it would confer on all parties concerned.

If any additional argument were wanting for giving the necessary powers to the Commissioners, we should find it in their Reports, and in the enfranchisements mentioned in them. A table of this sort is not a very readable production;

but if any one will take the trouble to wade through the lists appended to these productions, they will find that a regular increase, either in the number of enfranchisements or in the value of the land enfranchised, has always taken place as follows:—

Year.		Number of Enfranchisements.		Rough Value of Property enfranchised.		
				£	s.	d.
1841	-	1	-	105	0	0
1842	-	12	-	5335	14	0
1843	-	29	-	36,792	5	0
1844	-	39	-	71,415	0	0
1845	-	56	-	146,616	0	0
1846	-	56	-	119,538	0	0
1847	-	52	-	153,337	0	0
<hr/>				<hr/>		
245				533,138	19	0 <sup>1</sup>

We have been gratified in following some of these enfranchisements in their results; and we are here inclined to argue that if the Commissioners have enabled parties to gain great advantages with the limited powers already given to them, the benefits which would arise from granting them powers which would reach the real delinquents would be co-extensive with such extended powers. We are informed that the value of the land enfranchised since the establishment of the Commission, in June, 1841, may be roughly calculated at about 800,000*l.*; but who shall be able to say how much that value has been increased even in the short period that has elapsed since its enfranchisement? A walk from Charing Cross, or, at furthest, a drive in a suburban omnibus, would enable the reader to form some opinion of this for himself. If he went down to Kensington, he would find on his left hand, near to Kingston House, a terrace of large houses, with gardens adjoining, leading into squares, and backed by a handsome church; altogether presenting a very imposing appearance, and probably involving an expenditure of 100,000*l.* The land thus covered with these buildings belonged before the enfranchise-

<sup>1</sup> This calculation has been founded, as we understand, on the enfranchisements already effected, in which the consideration has been ascertained by a reference to the value of the land enfranchised; but in many enfranchisements the calculations have not been made on this principle, and these are not included in this list, although many of them are of great value.

ment took place to the Dean and Chapter of Westminster, and the fee simple was valued at 30*l.* a year.

Let the reader next place himself in the Islington omnibus, and as he approaches the neighbourhood of Barnsbury, let him ask for Tufnell Park, and he will soon find himself in a village that has suddenly sprung up, with houses, villas, gardens, cottages "with double coach-houses," and all those conveniencies with which our citizens delight to surround themselves. On a further inquiry as to how long all this has existed, he will learn that it has chiefly sprung out of an enfranchisement made by the present Secretary of the Treasury four or five years ago.

Let the worthy reader continue his drives, and he will see that the same thing is going on, more or less, at Ealing, Lambeth, Hanwell, Fulham, Croydon, Epsom, &c. &c., all arising out of land thus set free, chiefly belonging to the Church; for it is well known that, as the "acorn scorns to grow on servile soil," so the builder will not place brick and mortar except on freehold land; and it is to be remembered that the advantages of enfranchisement are not only felt by the parties — capital is usefully invested, labourers set to work, skill and industry employed; and if the State pays something for setting this operation in motion, this is soon returned in excise and stamp duties.

This aspect of the case in the present state of the revenue is really worthy of consideration. Most enfranchisements are made with a view either to agricultural or building improvements. In the former we are not aware of any immediate gain to the revenue, except in the results which must arise from the employment of labour; but no building, small or great, can be effected without a considerable percentage on the outlay finding its way into the public purse. If the speculation is unsuccessful, the excise duty on bricks, glass, paper, &c., and the customs duties on timber, if of foreign growth, must still be paid; and if successful, besides these, an annuity becomes payable to the government by the tenant, in the shape of assessed taxes, the moment he takes possession. In this way this Commission (the expense of which, from its having been tacked on to the Tithe

Commission, and using to a great extent its staff, is very moderate), so far from costing the country any thing, develops the resources of the country, and brings a considerable sum into the Treasury, which is voluntarily paid; and the revenue thus paid will increase the more the transfer of land is facilitated, and the more "free trade in land" is encouraged.

But the good work is not progressing, we are sorry to say, in *all* the suburbs of London. If there are lords who *will* enfranchise, there are also lords who *will not*. Let the reader go to Barnes, and he will find improvement in this way entirely stopped. The same thing at Barnet, at Stepney, at Hounslow, at Uxbridge, and — which perhaps is the worst case of all, considering its many desirable points — at Hampstead. Nay, it often happens that in the very same parish, when divided into different manors, which is not unfrequent, one lord will enfranchise, and another refuse. Thus in the good town of Islington, already mentioned, to which we have alluded as a site peculiarly applicable for building purposes, and nearly useless for any other, although Mr. Tufnell and Archdeacon Hale have enfranchised, yet other lords, whose lands *march* (as they say in Scotland) with theirs, will not, or demand unreasonable terms.

We have merely taken the neighbourhood of the metropolis as that most within our own knowledge; but the same thing is going on, both for good and evil, in all parts of the country where the copyhold tenure exists.

There is another point of great importance, which we trust will be attended to in future legislation. Let the machinery of the Commission be kept as cheap and simple as it is at present. Perhaps if more pains had been pursued in constructing it, it would have worked less easily. As it is, the mode of obtaining an enfranchisement could not be much improved, and we should be very sorry to see it impeded by any more elaborate framework.<sup>1</sup> If the parties like to pro-

<sup>1</sup> Although an elaborate machinery has been given by the act, parties have usually preferred acting under one section (s. 56.), which is very general in its terms. Since the above was written, Mr. I. M. Ludlow's edition of the Joint Stock Companies Winding-up Act has fallen in our way. The following observations as to act-drawing (among others) are true, and well worthy of attention.

ceed singly, the usual enfranchisement deed is taken; if six tenants join, they may, if they prefer it, adopt a schedule; and this deed or schedule (with the requisite proofs of consents) is the only document absolutely necessary to the validity of the transaction.

Then again as to the payment of the consideration for enfranchisement in cases of disability, or where persons have limited estates: if the parties prefer the administration of the Court of Chancery, they can pay the money into the Bank; but if not, two trustees may be appointed or approved by the Commissioners<sup>1</sup>, into whose hands the consideration money may be paid. The option is thus given, and will, we trust, be continued. This, we are satisfied, is the right mode of amending. Give the parties the old mode of procedure if they like to resort to it, but offer them a cheaper and a better mode at the same time. It will speedily be seen which, on the whole, is the best adapted for the purpose; and this will be the one resorted to. We trust that in any future legislation on this subject, this will always be had in view.

"It is in vain to attempt to foresee every difficulty, and the endeavour to provide for special cases, instead of relying upon general rules, must be fruitful in omissions. Justice, the end of law, is not to be secured by mere procedure, howsoever perfect; and I cannot but fear the extreme pains taken in the more carefully drawn modern acts of parliament, to provide for every detail of the working of a new system, are but a part of that idolatry of mechanism so prevalent at the present day, by which we expect to compass moral ends by material or intellectual means. The true problem of society, as it seems to me, consists in finding the best men for any given purpose, and the best means for securing the best men, rather than the best means for indifferent men to work by; and no powers need be too wide for those really competent and worthy to exercise them. Not to trust men is the surest way to make them untrustworthy; to put them into leading strings only makes them more helpless. Not, I fear, until parliament has the courage to lay upon all courts of justice, upon all officers of state, the responsibility of carrying out rules and principles without cumbering them with details, will it be able to substitute living men who do their duty, every one in his sphere, for the dead complication of wheels and springs in human shape which now form what is appropriately termed the 'machinery' of justice and of government." (Introduct. p. lv.) This accords very much with the idea of a friend of ours, who says that when once the matter is brought properly before the judge, in whatever degree, all that the legislature should say is, "*Do the needful!*"

<sup>1</sup> 6 & 7 Vict. c. 23. s. 14.

We cannot conclude this paper without a word as to what is passing around us with respect to copyholds on the Continent, and more especially in Northern and Southern Germany. The measures of STEIN in 1807, for enfranchising copyholds in Prussia, have been well called "admirable" by a modern historian<sup>1</sup>, and as "preparing the way for the resurrection of the monarchy." By these "landholders were allowed, under reservation of the rights of their creditors, to separate their estates into distinct parcels, and alienate them to different persons. Every servitude, *corvée*, or obligation of service or rent other than those founded on the rights of property or express agreement, was for ever abolished." But when rights of property were involved, the tenant was permitted, except in certain reserved cases, to obtain an enfranchisement on payment of a proper consideration. These measures have been repeatedly referred to by other writers<sup>2</sup>, not only for the manner in which they were planned, but for the highly beneficial consequences which have attended them; and now the statesmen of Austria are about to emulate them. Prince Schwarzenberg, in explaining, in November last, the views of the Stadion ministry, declared for the general amendment of the law; and, among other things, for the abolition of manorial courts and other petty jurisdictions, and the completion of large tenant-right measures, on the principle of a fair and equitable adjustment between the owner and occupier of the soil. Measures adequate to the occasion are no less necessary for England than for Austria. The tenant will now receive as a boon a fair and reasonable adjustment of his rights; if now withheld, the time may come — and we say it not as a threat, but as a warning, — when he may be able to obtain what he wants, but may not be so willing to pay a proper compensation; and this, so far as the reserved rights were concerned, the Prussian lords of manors have found during the last year to their cost.

<sup>1</sup> Alison, vol. ii. p. 243. ed. 7.

<sup>2</sup> See Laing's Notes of a Traveller, and Russell's Tour in Germany.

**ART. V. — REPORTS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.**

**COMMITTEE ON EQUITY.**

**THE** following reference was made to this Committee: —

To consider the state of the law respecting the confinement of persons alleged to be lunatics.

**REPORT AS AMENDED BY THE COMMITTEE.<sup>1</sup>**

In commencing their Report your Committee are desirous of stating that in their opinion the public, and more especially the unfortunate class of lunatics and persons of unsound mind, are exceedingly indebted to the Individuals who have lately paid so much attention to the subject of this reference, and whose efforts have led to the recent legislation respecting it; and they offer the following observations as contributory only to the object which they and this Committee have equally in view, the benefit of this class of persons and the further developement of the subject.

There are three classes of lunatics who are more or less the subject of legislation in this country: — 1. Pauper lunatics; 2. Persons found lunatic under a commission from the Court of Chancery; and 3. Persons not so found lunatic, but who are placed under the restraint of a lunatic asylum. The first and second of these classes this Committee do not intend to consider on the present occasion, but they are very

<sup>1</sup> It seems proper to state that the amendments made by the Committee did not in any material point alter the recommendations of the Committee, or modify the opinions therein expressed. But the Report was carefully revised, and some further facts and statements, chiefly corroborative of the views of the Committee, have been added to the Report. The Report as it now stands has the unanimous approval of the Committee. — Ed.



desirous of directing the attention of the Society to the third class of lunatics; that is to say, persons not being paupers, and who are not found lunatic under a commission, but who are placed under the restraint of a lunatic asylum.

It is now about seventy<sup>1</sup> years ago that the first attempt was made to provide for or protect this class of lunatics, who may be considered as belonging, with certain exceptions, to the middle classes of society; not coming, on the one hand, under the denomination of paupers, and on the other not having property sufficiently large to afford the expense of a commission and the subsequent proceedings in Chancery.<sup>2</sup> The principal act for the protection of this class of lunatics is the 8 & 9 Vict. c. 100.<sup>3</sup> (a most valuable act not only in what it actually accomplished, but in what it is likely to lead to). By virtue of this act a permanent body of Commissioners in Lunacy is appointed, and it is enacted that it shall not be lawful for any person to receive two or more lunatics into any house, unless such house shall be a county or borough lunatic asylum, or a hospital duly re-

<sup>1</sup> See Report Metrop. Commissioners in Lunacy (1844), p. 1.; and the Report of Commissioners in Lunacy (1847) p. 67., for the history of these attempts. It appears by the preamble of the 14 G. 3., Jan. 1774, that in consequence of "many great and dangerous abuses in houses for the reception of lunatics," five Fellows of the College of Physicians were appointed to license and to visit licensed lunatic asylums in London, Westminster, Middlesex, &c. Act continued 19 G. 3.; ditto 26 G. 3.; ditto made perpetual; Mixed Commission, 9 G. 4.; amended, 10 G. 4.; physicians and barristers to be commissioners, 2 & 3 W. 4. (an. 1832); continued 5 & 6 W. 4. (an. 1835); continued 5 Vict. (an. 1841); amended 5 & 6 Vict. (an. 1842); lastly, the act of 8 & 9 Vict. c. 100. (4th Aug. 1845).

<sup>2</sup> It has been calculated that Chancery lunatics number 3 out of every 100 lunatics, and the two remaining classes embrace the remaining 97, of which by far the greater proportion are paupers. In 1843 the total number of insane persons ascertained to exist in England and Wales exceeded 20,000. (See Report of the Metropolitan Commissioners in Lunacy, 1844, p. 7.) In 1847 they amounted at least to 23,000, of whom 5000 belonged to the higher and middle classes of society, and about 18,000 were paupers. (Report of the Commissioners in Lunacy for 1847, p. 54.) In a subsequent page they are estimated at about 26,516.

<sup>3</sup> It is to be observed that many of its provisions are re-enactments of the provisions of previous acts. The Commissioners were first appointed in 1828. (See *post*, p. 317. n. 2.) A consolidation of all the acts relating to lunacy would be highly desirable.

gistered under the act, or a house for the time being duly licensed under that or some other act of Parliament; and in general no such persons can be legally received in a house so licensed without a written order from the person sending him, and two medical certificates, each of them being signed by a physician, surgeon, or an apothecary, in such form as prescribed by the act. It is also provided that the medical man attached to the establishment should certify as to the particulars of the case.<sup>1</sup> Nor can even a single person be legally received or taken charge of in an unlicensed house as a lunatic without such order and certificates, unless the person receiving him be one deriving no profit from the charge. The licences in question are to be granted after fourteen days' previous notice (for any period not exceeding thirteen calendar months) in London and Westminster, and many of the suburban parishes, by the Lunacy Commissioners sitting as a board, composed partly of medical men and partly of barristers, at a quarterly or special meeting; and in the country by the justices for the county or borough in general or quarter sessions. It is provided that the keepers of such houses shall constantly report the admission, death, removal, discharge, or escape of patients; that the houses shall be provided with proper medical attendance; that they shall be frequently visited and inspected by the Commissioners and by visitors appointed in the country by the magistrates at quarter sessions, at uncertain and unexpected intervals, and in certain cases even by night; that reports shall be made by the visitors to the Commissioners, and by the Commissioners to the Lord Chancellor, in June every year, of the state of the houses visited by them, and the care of the patients therein, and that any persons detained therein without sufficient cause, with the exception of persons found lunatic under a commission, or confined by order of the Secretary of State for the Home Department, or under the order of any court of criminal jurisdiction, may be set at liberty by the Commissioners or visitors. By statutes 3 & 4 W. 4. c. 36. and

<sup>1</sup> 8 & 9 Vict. c. 100. s. 60

5 & 6 Vict. c. 84. it is enacted that the Lord Chancellor may appoint three persons, two of whom shall be physicians and one a barrister, to be visitors for superintending, inspecting, and reporting upon the care and treatment of certain persons found lunatic. That for this purpose there should be joined with them the "Masters in Lunacy," being two judicial persons lately appointed for the discharge of all the duties generally under commissions in the nature of writs *de lunatico inquirendo*. But these statutes only apply to persons found idiot or insane under a commission in the nature of a writ *de lunatico inquirendo*.

Under the present acts, then, it comes practically to this, that any person may be placed in a lunatic asylum on producing a written order which may be signed by any person, and two certificates, each signed by a medical man, that they consider him insane, and may be lawfully detained in such asylum, without any further opinion being taken as to the fact of the lunacy, and subject only to the visits of the Commissioners in Lunacy before mentioned, and in the country, of the visiting justices in addition. It is to be remarked that all the persons who thus concur in depriving the alleged lunatic of his liberty (except the Commissioners and visitors) may have an interest in representing him to be a lunatic, and keeping him confined. In the person signing the order already mentioned there may be an interest the most direct. The person who arrests him, and takes him by force, if necessary, to the asylum, is subject to no regulation; he is not a person in any way recognised by the law; he is appointed by no person directly responsible. The occupation, though a necessary one, can only be endurable by a particular class of persons; and we thus find that those who are so employed are sometimes persons of bad character. The medical men who sign a certificate, are not any body of that profession resident in the several counties selected for their peculiar skill in this department of medical knowledge, or their especial standing or respectability: they may be any members of that profession wherever resident, with some unimportant qualifications<sup>1</sup>, whom the parties interested choose to select; and it may be that in a particular case applications may be made

<sup>1</sup> As to these see 8 & 9 Vict. c. 100. s. 49.

to many medical men previous to the necessary certificates being procured; and of course if any misconduct is required, those members only will be chosen who are capable of it, and such will find their way into the most honourable professions. It is also to be observed that even in the most upright members of any profession there is a natural sympathy with those who employ them, from which it is difficult for the mind to divest itself. Thus any person whoever, sane or insane, may possibly<sup>1</sup> be immured for life in an asylum on false or erroneous certificates, which have been procured from medical men of very questionable character. The Commissioners in Lunacy, however, established as a permanent body<sup>2</sup> in the year 1845, are a very considerable check upon the abuses of this system; they consist of eleven commissioners, of whom six are visiting commissioners, three being physicians and three barristers, whose duty it is to visit and exercise control over the lunatic asylums of the whole country; the remaining five, who visit and perform other efficient service chiefly in London, receive no remuneration. It seems, however, almost impossible that the Visiting Commissioners can make a special examination of each of the persons so confined; at all events, it is certain that in many cases a considerable interval must take place between the date of the first confinement of the lunatic and his examination by the Commissioners. Within their own jurisdiction they are to visit each asylum not less than four times a year; and those in the country not less than twice in a year; and in many cases it is presumed the Commissioners will content themselves with this number of visits. It would seem, indeed, that considering the number of the lunatics so confined in England and Wales, that all that the Commissioners can do is to give a general superintendence over the asylums, and regulate their mode of proceeding, and at farthest attend to the more prominent and special cases. This,

<sup>1</sup> It should be observed that the proprietor of an asylum keeping a sane person in confinement would be liable to an indictment for conspiracy, and would, as has occurred, be subject to deprivation of his license, for not reporting the fact to the Commissioners or Visitors.

<sup>2</sup> Previous to that year they had been only appointed from time to time for three years.

indeed, appears from the valuable reports which they have made.

Believing that in all this the Commissioners and Visiting Justices render most valuable services to the public, your Committee are still of opinion that something more is required, and that the complete necessity of the case demands attention to two important matters; first, as to the liberty of the supposed lunatic, and next as to his property. Your Committee are also desirous of offering some observations on the regulation of lunatic asylums on some points not hitherto fully attended to.

I. *And, first, as to the liberty of the supposed lunatic.*—It is obvious that where misconduct or fraud are intended, the present system does not provide effectually against them. It would not be an impossible train of circumstances to bring together that the two medical certificates should be obtained from interested, careless, or even corrupt medical practitioners; that the caption should be made by ignorant and sordid agents, at the instance of wicked relations or false friends, who, if they were such, would have no hesitation in also signing the order. Nor is it difficult to suppose that the person so lodged and confined in an asylum should be detained there by unfair means, and that great cruelty should be practised upon him. There is abundant evidence to prove that all this has formerly occurred; and that one or more of the persons necessarily employed in carrying the caption into effect often abuse their authority, is certain. The question is, whether there is a sufficient amount of evil to warrant some further legislation on the subject; and your Committee have come to the conclusion that there is. For it is to be remembered, that where so great an abuse as the unjust deprivation of liberty can easily be committed, the interference of the legislature is sufficiently warranted. What, then, is the remedy which should be proposed?

It seems right that immediate means should be taken in cases of lunacy for the custody of the lunatic, as well for the safety of himself as others; and the power of giving evidence as to the fact of lunacy can be, your Committee fully admit, no where so properly placed as in the hands of the medical pro-

fession. Your Committee would therefore leave untouched that part of the law which requires medical men to give certificates on this point. All they object to is, that certificates should have the effect of authorising perpetual confinement without any further examination, except that made by the Commissioners in Lunacy and the visiting justices in the country, which may be deferred for a very considerable period after the lunatic has been first confined. Your Committee are of opinion that before the liberty of a person is taken away on the ground of his being a lunatic, there should be a further inquiry by some person having a judicial character within a reasonable period, to be determined by law, after the first confinement in the asylum. And as to this, it is to be further observed, that a residence for any time in an asylum has been known under certain circumstances to render the person so confined insane. To whom this judicial investigation should be intrusted is, perhaps, not of great importance, if the principle of some judicial investigation be admitted.

Whenever it was practicable to obtain the opinion of the "Masters in Lunacy," they would seem to be the most proper persons to be employed. But if this were not convenient, it would be necessary to resort to some other tribunal, as the Judge of the County Court, or the Magistrates at Petty Sessions, who might act in public or in private as they might judge expedient, or it might be thought more advisable, at the option of the alleged lunatic, if he were capable of exercising it, to call in a jury of five or seven to decide on this fact; but your Committee are, on the whole, inclined to prefer leaving the matter to be decided on by some judicial person, on whom the responsibility of the confinement should entirely rest. As a point in comparative jurisprudence, it is to be observed, that in Scotland no person is received in a lunatic asylum without an order from the sheriff-depute or substitute, who must satisfy himself as to the propriety of the order by the certificates of two medical men, and such other evidence as he thinks necessary under the circumstances<sup>1</sup>; but the committal never rests on medical evidence alone.

<sup>1</sup> 55 Geo. 3. c. 69. s. 9.; 9 Geo. 4. c. 84. s. 5.; 4 & 5 Vict. c. 60. s. 1.

II. But there is another very important portion of the subject for which the recent acts make scarcely any provision at all: we mean as to the property of the person so confined. On a person being found a lunatic under a Commission from the Court of Chancery, the property is taken possession of by the order of that Court, and is placed under the control of his Committee: but where a person is declared to be a lunatic by certificates, no provision whatever is necessarily<sup>1</sup>

<sup>1</sup> There are two clauses of the 8 & 9 Vict. c. 100. (ss. 94, 95.), which enable the Master in Lunacy to make inquiries, and to report to the Lord Chancellor on the subject in certain cases. But your Committee conceive them quite inadequate to remedy the mischief complained of, because immediate steps are required when there is any fear of improper misapplication. The Commissioners in Lunacy also consider these clauses to be insufficient. In their Report for 1847, p. 28., they state that the procedure is practically unavailable in cases of small income. The Committee, however, wish to state what they understand has been done under those clauses. Under sect. 94. the Commissioners in Lunacy may report to the Lord Chancellor when they "have reason to suppose that the property of any person detained or taken charge of as a lunatic is not duly protected, or that the income thereof is not duly applied for his maintenance." Under sect. 95. the Lord Chancellor may direct one of the Masters in Lunacy to examine a person who has been detained as a lunatic for the twelve months then last past (under certificates), or who shall have been the subject of a Report (as above mentioned) by the Commissioners (sect. 95.), and take evidence and report to the Lord Chancellor whether such person is a lunatic. When the Master reports that such person is a lunatic, and such report is confirmed, the Lord Chancellor may appoint a guardian of the person (with the powers of a *committee of the person*) and a receiver of the estate, whose powers are not equal to those of a *committee of the estate*, but to those of a *receiver* merely. The proceedings in the office of the Masters in Lunacy and the Secretary of Lunatics are nearly the same as under commissions, but in some respects less expensive. The expense of a grant is saved, but a recognisance is entered into by the *receiver* for the security of the lunatic's estate. When the proceedings do not originate in a Report by the Commissioners in Lunacy, the Lord Chancellor's direction to the Master in Lunacy is granted on petition, as in the case of an application for a commission.

Since the act passed in 1845, there have been about thirty cases reported on, averaging ten a year. But in two of these cases it was found that the Lord Chancellor's powers were insufficient, and Commissions were afterwards issued at great expense. In a few cases no proceedings have been taken subsequent to the confirmation of the Master's Report as to the lunacy simply. The reason of this in one case is, that the Lord Chancellor under the act has no sufficient power (so it is supposed) to compel a transfer of stock by the Bank of England. In other cases, probably, a difficulty with respect to costs has stopped the proceedings, as it seems that the act only enables the Lord Chancellor to deal with the *income* of the lunatic *not the corpus* of his property. It is not surprising,

made as to his property ; this is spent and appropriated as his relations or friends can best arrange. It may be quite true that in many cases it is properly managed ; but, on the other hand, it is obvious that the door is open to great abuse in its management ; and it cannot be doubted that many acts are committed, even with the best intention, which are not strictly legal, while in some cases it is certain that the property is fraudulently applied or made away with.<sup>1</sup>

Your Committee have in this respect a great and, as they conceive, a most important alteration, or, to speak more correctly, restitution, of the law to propose. They have to recommend that within such period after the lunacy has been properly established as the judicial officer who shall have determined as to the fact of lunacy shall deem reasonable, the property of the lunatic of all kinds shall vest in an official committee, to be administered for his benefit by the Masters in Lunacy, or by some local jurisdiction in the provinces. In making this proposal, the Committee consider they are only reviving an old rule of law,

therefore, that when the income is very small (not sufficient for maintenance), a solicitor will not be at the expense of proceeding and paying money out of pocket. Sect. 96. gives the Lord Chancellor jurisdiction over the person and property of these lunatics only, while they are properly confined under certificates, and "for such further time, not exceeding six months, as the Lord Chancellor may fix." (The General Orders fix six months.) Three objections occur to this Committee as to the mode of proceeding ; namely, the want of power in the Lord Chancellor to apply any part of the *corpus* of the lunatic's property in payment of costs, or for any other purpose ; the difficulty mentioned with regard to compelling the Bank of England to transfer stock or pay dividends ; and the insufficiency of the receiver's powers. It is not always easy to say what is the difference between the powers of a receiver and a committee of the estate ; but in dealing with the real estate of a lunatic, the difference would be discovered. One very great drawback to the new powers under the 8 & 9 Vict. c. 100. is the great expense. The expenses of the commission and inquisition (counsel, jury, and sheriff's expenses chiefly), and also the expense of the grant, are saved ; but in most other respects the expense is the same as in proceedings under a commission, and, as has been shown, the proceedings are not equally effectual. See Lord Chancellor's Orders in Lunacy under this act, 1 Dec. 1845 ; and the second edition of Shelford on Lunacy, pp. 221—226.

<sup>1</sup> In the Report of the Commissioners for 1847, p. 60., the property of lunatics is roughly stated as involving the administration of about 1,000,000*l.* per annum, and a capital amounting in value to several millions of money.



enforced by a statute obsolete indeed, but certainly not repealed, and cited by Blackstone<sup>1</sup> as still in force; the stat. 17 Edw. 2. c. 9., usually called the statute *De Prerogativa Regis*; by which it is declared that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind. It seems clear that the old principle of our law was that the Crown should take charge of every lunatic *with lands*; i. e. with property; and the practice has been only discontinued by reason of the expense attending the execution of writs *de lunatico inquirendo*. The theory of the law is, that in every case where there is property the Crown takes possession of it for the benefit of the lunatic. This jurisdiction can be most properly exercised by the Lord Chancellor as representing the Crown in this particular.

Your Committee are quite willing to admit that the procedure of the Court of Chancery is ill-adapted for the administration of the amount of property usually possessed by the class of lunatics of whom they are treating; but this is merely an additional argument for the introduction of those necessary reforms into this Court which this Committee has already recommended, and which would adapt its procedure to the necessities of the times, and enable it to deal with small as well as large properties. But it is to be observed that the machinery of the Office of the Masters in Lunacy is already much more simple and somewhat more cheap than that of the Masters in Chancery; and in the new department of the Visitors of Lunatics, which is in some degree connected with that of the Masters in Lunacy, the principle of an *ad valorem* payment has been to a certain extent acted on. If this principle were adopted more completely, and a few other alterations made, this Committee believe that the Court of the Masters in Lunacy would be well adapted to deal with all lunatics not coming within the description of paupers. Mr. Enfield, the chief clerk of the Masters in Lunacy, in his evidence before the Fees Committee of the House of Commons (First Report, 1848, p. 37.) gave the following opinion on this subject: — “Having first settled

<sup>1</sup> 1 Bla. Com. 305. See as to this act, 1 Spence's Eq. Jur. 618.

how large an annual rate has to be imposed on the suitors to pay the salaries and expenses of the Court, taxes should be put on the proceedings in the Court to raise the required amount; in arranging which, regard should be had to the value of the subject-matter in the suit and under administration, and to the length and trouble of the proceedings." "It would," he says, "be found very practicable to carry out this principle by fixing a per centage or *ad valorem* duty on the dividends and interest on the funds of the suitors at the accountant general's, and a like duty on the incomes of estates under the care of the Court as appearing on the receiver's accounts; and further by a stamp duty, on which the official documents are written." Mr. Enfield adds, in answer to a subsequent question, "The business of our office is wholly that of administering property, and therefore the principle of per centage, or *ad valorem*, is strictly applicable to every thing in the office." If some such principle as this were acted on, it seems probable that small properties, in which very little trouble was necessary, might be very economically managed. But your Committee wish to state their strong opinion that to be practically of use, the machinery for managing the property of lunatics of moderate means must be cheap and simple.

The advantages which would attend on this proceeding would be, that the property of the lunatic would no longer be left to the mercy of his relations or others who may get or keep possession of it; nor would the lunatic, on the other hand, be exposed to the ill-consequences which frequently follow from illegal though often well-meaning acts, but such property would be duly received and administered. Proper allowances for maintenance, &c. would be made not only to the lunatic himself, but also to such relations as had a just claim on him; his real estate would be properly superintended, the buildings repaired, the debts duly collected, the moneys rightly invested, and the whole retained for the benefit of those interested, instead of being ill-administered, or positively wasted and dissipated, as now too often happens. It is true that the lunatic might speedily recover, and be able again to manage his own property; but if the

office fees were small (and they might easily be made so), he would not object to paying something for the machinery which restored his property to his own custody. It may be further observed on this head, that by the Code Civile of France (liv. i. tit. 2. 62.), the Tribunal de Premier Instance has power in an early stage of proceeding to appoint a provisional trustee (*administrateur*) to take charge of the person and property of the lunatic. This trustee continues to act until judgment of interdiction, when a guardian (*tuteur*) is appointed.<sup>1</sup>

On this part of the subject your Committee are glad to strengthen their own opinion by that of the medical officers of a long established and well conducted asylum, the Royal Lunatic Asylum at Dundee. In their Report for 1847, they say, "In our opinion, while doing justice to paupers, the legislature ought to endeavour to throw the shield of protection over the wealthy lunatic at the same time. Safe

<sup>1</sup> Pulleine on Foreign Asylums, p. 27. By the law of Scotland a person of a facile, weak, or profuse disposition may voluntarily interdict himself from doing any deed which may affect his estate without the consent of certain persons named by him, and technically called interdictors. The restraint thus voluntarily imposed cannot be recalled at the pleasure of the person who has laid himself under it; but it may be removed — 1st, by a sentence of the Supreme Court, either on the ground that it was originally unnecessary, or that the interdicted person has, since the interdict, become *rei suæ providus*; 2nd, without judicial interference it may be removed by the joint act of the interdictor and the interdicted person; 3rd, where a quorum of interdictors is named, the restraint ceases, if by death or otherwise the number of interdictors is reduced below the quorum. The annual income only of the interdicted person being applicable to his maintenance, he is thus placed in respect of his property in a situation somewhat similar to that of a *feme coverte* in respect of the income of her separate property when restrained from anticipating the growing payments of such income. With the sanction of a judge of the superior courts in England it might be expedient to extend the law of voluntary interdiction to cases even of persons who are lunatic and sane only at intervals. By adopting the law above referred to, much distress of mind, caused by public proceedings in cases of lunacy, to the relations of the parties would be saved; and there seems to be a great expediency, particularly in cases of weakness of intellect from old age, &c., in enabling such persons to protect their property from the scheming intrigues of interested relations or others; for though as the law stands a person of a facile disposition may, by a voluntary settlement of land, attain in part the objects here alluded to, yet by a subsequent sale of such lands to a purchaser for an adequate valuable consideration, such voluntary settlement may be defeated, though the purchaser had notice thereof.

custody is not enough except in so far as it is a protection to the public; the comfort and the probable cure of the patient ought also to be attended to. We would earnestly press upon the attention of the legislature the necessity that exists for making some provision in the act in behalf of wealthy lunatics. A provision should be made also, that when such lunatics are sent to an asylum, no relative alone should have the power to remove the patient, or to limit at his own will the sum to be expended in the maintenance, comfort, and cure of the unfortunate person. *We believe it is no uncommon thing for a patient, with a free income of several hundred pounds a year, to be restricted by his relatives to a mere pittance — say forty pounds — that they themselves may look forward to the enjoyment of the surplus when he is dead.* Our opinion is, that in all cases of lunacy, when the patient is wealthy, the power of removal and of limiting the allowance for his maintenance, comfort, and cure, ought to be exercised under the control of the sheriff of the county. If a board of lunacy is to be appointed for Scotland, whether lunatics are to have the benefit of trial by jury before admission or not, part of the duty of its Commissioners and Inspectors ought to be to inquire into the state of the funds belonging to private patients, as well as into the condition and treatment of the patients themselves; and this for the obviously equitable and humane purpose of ascertaining whether their comforts and indulgences are commensurate, or are stinted by relatives or guardians." (Pp. 24, 25.) These opinions are dictated by the practical experience of two physicians (Dr. Nimmo and Dr. Mackintosh), long acquainted with the particular circumstances relating to the class of lunatics who are the subject of this Report.

III. A few words remain to be added as to the further regulation of the lunatic asylums appropriated to this class of lunatics.

A question has arisen, whether the whole class of private lunatic asylums should not be abolished, and public asylums substituted, which should be subject to the direct control of the government. Your Committee are not prepared at present to recommend that this should be done, although it deserves

consideration. It cannot be denied that the proprietors and keepers of private asylums, who take a narrow though erroneous view of their interest, must desire to keep those patients who pay a handsome board as long a time in their custody as possible; and that much abuse and cruelty have prevailed in some of these establishments, and may be still committed.<sup>1</sup> But, on the other hand, the true interest of the proprietors and medical authorities of these asylums, as well as their bounden duty, is not only to cure their patients, and restore them to their friends as soon as possible, but to render their residence, while in confinement, as comfortable and happy as may be. It is to be observed that in Scotland<sup>2</sup>, private asylums, although they exist, are but little encouraged, but that the public asylums provide for the reception of the better class of patients, and that this is not only found advantageous to the richer classes, but proves beneficial to the pauper, lunatics. There can be little doubt that public asylums, being more under the control of public opinion, are better managed

<sup>1</sup> That this existed as late as the year 1847, is fully shown by the Fourth Report of the Commissioners (1847), part 3.

<sup>2</sup> In Scotland all the public lunatic asylums receive patients of the better classes of society, and the managers of those institutions at Dundee, Montrose, Aberdeen, Glasgow, &c. seem to regard the higher board paid by the richer patients as going far to enable them to carry on the affairs of their institutions in a better manner than they would otherwise be enabled to do, especially as regards the diet and comforts of the pauper class patients confided to their care by parochial authorities, who in many cases pay no more than at the rate of 15*l.* to 20*l.* a-year for each patient. In England several of the county lunatic asylums, as those at Gloucester, Stafford, Nottingham, Leicester, &c., receive patients of the better class of society, who, in consideration of a higher rate of board, have a better diet, more comforts, &c. than the ordinary patients. Some of the other public asylums in England, as the York Asylum, the Bethel Asylum, Norwich; St. Thomas's Hospital, Exeter, &c., also receive patients of the better classes of society. It may be said that in Scotland (though the reverse seems to be the case in England) the feelings and opinions of the relatives of patients of the better classes of society seem in most cases not to be unfavourable as regards the propriety of their relatives being sent to public institutions, instead of being sent to private lunatic asylums. No doubt in both parts of the United Kingdom there frequently prevails on the part of relatives strong objections to the propriety of sending the patient to a lunatic asylum in the earlier stages of the disease, under the plea that, by keeping the patient in the family, in retirement, there is a greater chance of a speedy recovery; but this has been found in practice to be an erroneous opinion.

than private asylums, and that more of the patients recover. The Lunacy Commissioners in their Report for 1847 say, "The public asylums have been in advance of the rest. The funds by which they are raised and supported, and the causes which influence those who have control over them, necessarily give them a superiority over private establishments." (P. 63.) The Chairman of the Gloucester Quarter Sessions, on suspending the licence of a private lunatic asylum, on the 18th of Oct. last, entered at some length into the distinctions between public and private asylums.

" Having had a good deal of conversation with magistrates and other persons on the subject, I have found that a great want of knowledge exists relative to the management of insane persons, both in public and private institutions. The law is said to be more favourable to the rich than the poor, but here it is the contrary: the law is far more favourable to the poor than the rich. The law, as regards public institutions for the reception of the insane, has many safeguards, which are not held as shields over the rich; and as these safeguards for the rich are so few, it becomes more than ever the duty of this court to see that what safeguards there are should be carefully attended to, and not be set aside on any ground. Now, to draw a comparison between public and private asylums, we find that the public asylums, in the selection of superintendents and other officers, select from a vast number of individuals, and the persons chosen are persons who possess the best testimonials; but in private asylums there is nothing of the kind. The law only requires<sup>1</sup> that persons should give fourteen days' notice of their intention to apply for the grant of a licence to keep an asylum; the law does not point out that the applicant shall produce testimonials of fitness, and therefore this safeguard is lost. Then, again, as to the situation of the inmates of public asylums, that is, of pauper patients, and the situation of the inmates of private asylums, that is, the richer patients, we shall find an immense difference between them. In the

<sup>1</sup> It may be here observed that magistrates ought to follow what the Committee believe to be the practice in the London districts, which appears to be more strict than in the country. See as to this Further Report, 1847, p. 13. app.

public asylums, the superintendents and others have no interest to detain patients unnecessarily—no interest whatever but to cure them as soon as possible, because there is less trouble in a speedy cure; but in a private asylum, there is a reason for detaining patients, because, if there are no patients in the institution, there are no profits arising from it. That is the especial feature of private asylums—there is a decided interest in detaining patients. There is a decided interest, in the same way, to do things as economically as possible; but it is not so in public institutions for insane persons. And this last point is of the greater importance, because generous diet, good treatment, and amusements are the modern means of curing insanity. Now, what is the fact with private asylums? Their interest is to use the cheapest mode, which is mechanical restraint (not the best mode); and restraint is the cheapest, because, when parties are tied up, no attendants are required, and are not kept. Now, the safeguard against improper conduct in private asylums is two medical certificates. First, there must, by the law, be two certificates given by two physicians, surgeons, or apothecaries, before a patient can be admitted into a private asylum. In cases of emergency, one certificate so signed is sufficient, but within three days the party confined must be examined (certified) by some other physician, surgeon, or apothecary not belonging to the institution in which the patient is confined. The next safeguard is the visits of two Commissioners of Lunacy; but this amounts to very little, for the Commissioners are not compelled by law to visit more than twice a year; and the circumstances in Dr. ———'s case occurred in the middle of the interval between their visits, those visits being eight months apart, that is, from the 18th of May, 1847, to the 22d January, 1848. The next safeguard is the visits of the persons appointed to visit by this court; these are not less than three magistrates, with a physician, and they are not compelled to visit more than four times in the year. Usually they visit once a quarter. The visits of the relations of patients may or may not be refused; but if there is any special reason which may influence the keeper of a private establishment to prevent relations from

seeing a patient, he has only to deny them, on the ground of ill health, and there is an end of it. There is a special clause in the Act of Parliament, the object of which is to enable two visitors to visit not only in an ordinary way, but in an extraordinary way. Supposing a patient in any asylum complains to the visiting magistrates that he is detained though he is not in a state of insanity, or that he is ill-used being insane, there are special visits which may be made by the Commissioners. But supposing the complaint of the patient is not allowed to go to the visitors, there is an end of the utility of that special clause. In fact, there is time to make a man mad if he be put under restraint until the visit is made. There is another case: there is the question of a single patient of a private asylum placed in a house not forming part of the plan of the house licensed, but a building separate from it. The establishment being distinct and separate, the visitors have no power of going into that separate house. That arrangement opens a very, very large field for abuses, for few Commissioners have the right to go in there; only Commissioners who are members of a private board visit a house of that description. If it should turn out that in any of these separate houses in connection with private institutions, the rations of the patients are received from the original house, then it becomes a matter of serious question, whether or not the person holding such a house has the right to exclude the visitors from that house—whether he comes under the powers of the Act of Parliament—whether he can keep that house separate, because it involves great doubt as to the separation. It must not be forgotten, too, that there is sometimes an interest in sending a party to an asylum. It must not be forgotten, I say, that there is often a strong interest in the nearest of kin, strong reasons for sending a relation to a private asylum. To sum up, the only safeguards as regards private asylums are these: fourteen days' notice of intention to apply for a licence; two medical certificates, except in cases of emergency, when one will do temporarily; the visits of the Commissioners in Lunacy twice a year; the visits of the magistrates four times a year; there are also entries to be made in the books of these institutions, and the



reports of the visitors are to be sent before the court. The last regulations are very material; the entries are to be made by the visitors and Commissioners; and the law imposes on the keepers the responsibility of sending copies of the entries in three days to the clerk to the visitors. The law next imposes on the clerk to the visitors the duty of sending to those whose duty it is to license lunatic asylum keepers, to the magistrates at Quarter Sessions, all the reports he has received. The law imposes on the Quarter Sessions the duty of examining these reports, to see if the person from whom they come is a fit and proper person to have a licence renewed or not. The law really is unsatisfactory, in failing to shield sufficiently the rich patients in private establishments for the cure of insanity. The safeguards against improper conduct in private institutions are so few, that there are many cases of abuse in private establishments not likely to occur in public establishments. Witness the case of Mr. Campbell, who was detained for fourteen years, at the end of which time he became possessed of some property. A jury was impannelled to inquire into his state of mind, and they actually determined not merely that he was not insane at the time, but that he never had been insane at any time. What I respectfully submit to the Court is this: the safeguards are so few, that it becomes absolutely necessary to see that these safeguards are attended to." (As reported in the *Gloucester Journal* of October 21. 1848.)

The licence was ultimately granted on the 2d of January last, after a long and careful investigation, conducted by counsel, but the chairman thought it right to make the following observations: — "The result of the inquiry has demonstrated that private asylums have not the advantages of public ones, and that the law in such cases was most deficient, and required alteration. The patients in many of these asylums were infinitely worse off than those in pauper asylums. The law and practice as regarded lunatics varied: for the poor it was based on publicity, while for the rich it was based on seclusion and secrecy. He would also observe, that there was great remissness as regarded certificates, that letters were improperly withheld, and that magistrates

should be more frequent and more careful in their visits." (As reported in the *Morning Chronicle* of Thursday, January 4. 1849.)<sup>1</sup>

<sup>1</sup> The Committee have been favoured by Dr. Webster with the following statement with respect to Bethlem Hospital:—"During the 28 consecutive years, ending the 31st December, 1847, the following table shows the movement of insane curable patients at Bethlem Hospital.

Admitted.			Cured.			Died.		
Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
2,539	3,791	6,330	1,217	2,035	3,252	145	166	311
Excess of Females over Males, 49·30 per cent.			or 48·40 per cent.			or 5·71 per cent.		
			or 53·67 per cent.			or 4·40 per cent.		
			or 51·37 per cent.			or 4·91 per cent.		

"During 100 years, ending the 31st December, 1843, the total admissions, cures, and deaths of curable insane patients, may be thus stated; viz. —

Admitted - 17,803 curable insane patients,

Discharged cured 7,108 or 39·86 per cent.

Died - 1,799 or 10·10 per cent.

"In order to indicate the progressive improvement which has taken place during the above period, it is instructive to know that in the 20 years ending the 31st Dec. 1762, the ratio of cures and deaths at Bethlem Hospital was as follows —

"Cured 32·50 per cent. of the admissions.

Died 21·66 per cent. ditto

"In 20 years ending 31st Dec. 1782, —

"Cured 34·50 per cent.

Died 13·20 per cent.

"In 20 years ending 31st Dec. 1802, —

"Cured 35·33 per cent.

Died 5·20 per cent.

"In 20 years ending 31st Dec. 1822, —

"Cured 41·50 per cent.

Died 5·17 per cent.

"In 20 years ending 31st Dec. 1842, —

"Cured 51·50 per cent.

Died 5·7 per cent.

"But in 1847, the proportion of cures was 56 per cent., the deaths being 3·82 per cent.

"These figures show satisfactorily how much the ratio of recoveries has augmented, whilst the deaths have also remarkably diminished. It often happens, at the present time, that out of upwards of 400 insane patients, not a single individual is under even temporary restraint of any kind. On this point, it is interesting to remark that,

"In 1839 the average ratio of restraint was 11 patients a week, or 3·53 per cent.

"In 1842 the average ratio was 3 patients per week, or 0·81 per cent.

There is therefore a good deal of testimony in favour of public lunatic asylums, while at the same time your Committee feel bound to state that many private establishments are conducted very properly, and with kindness and advantage to the insane. On the whole, therefore, your Committee think that greater advantage will arise to the community from continuing private asylums, but increasing the number and accommodation of public asylums.

With regard to private asylums your Committee, however, recommend that increased inspection, more frequent official visits, and, what is perhaps even more important, greater strictness in granting both licences and certificates should be required. The publication of the returns directed by the act, your Committee conceive will tend to keep up a spirit of benevolent rivalry between public and private establishments, and will, it is hoped, in a great measure counteract any desire of improperly detaining any patient that now so frequently operates to their prejudice, and forms so serious an objection to the existence of private asylums.

It would seem that it would be attended with advantage if public asylums were more universally established throughout the counties, and so managed as to admit of the reception of the richer classes, so that the public might, on the payment of a handsome board, have the option of employing

“ In 1847 the average ratio of restraint fell to *only*  $\frac{1}{4}$  of a patient per week, or 0·6 per cent.

“ In fact, as already mentioned, often not one patient amongst all the inmates is now under restraint.

“ In old Bethlem Hospital, when personal coercion was so common, and the mode of treating the insane patients was very different from the present method, suicides were unfortunately often met with. For instance, in twenty years ending the 31st December, 1770, out of 3,629 patients admitted, 18 committed suicide, or 1 suicide in every 202 admissions. On the other hand, during twenty years ending 31st Dec. 1842, in 4,676 admissions, there were only five suicides, or 1 in every 925 insane patients. Again, in the first-named period of 20 years, 55 patients “ran away” from the Hospital, being 1 escape in every 66 patients admitted; whereas, in the 20 years ending the 31st Dec. 1842, only 16 patients escaped, or 1 in every 292 admissions, being one-fourth the previous amount; although the straightwaistcoat is now never employed, and the treatment of patients at Bethlem Hospital is very different from what it was in the olden time; amusements, occupation, and much greater freedom, in addition to medical remedies, being often put in requisition to aid their recovery.”

them, and the lunatic that of a treatment which left no suspicion as to the operation of interested motives.

But there is one regulation applicable to these asylums, the necessity for which your Committee would most earnestly enforce. It is that provision should be made for their regular visitation by the clergy, with certain restrictions. Your Committee cannot but express their surprise, that while so much care has been shown for providing proper advice for the bodily sufferings of the patient, no necessary provision is made for his spiritual assistance.<sup>1</sup> Your Committee believe that to these afflicted persons the advice and visitation of a religious person would, in most cases, be peculiarly soothing and beneficial. And they consider it to be the bounden duty of the state to make some provision for it. The Commissioners, in their Report for 1847, p. 221., say, "We believe the moral treatment and the service of a chaplain are of much importance." And again, p. 228. "The regulation for the employment of a clergyman and the performance of the duties of a chaplain in lunatic asylums afford means of great importance for improving the comfort, and promoting the recovery of lunatics. At the Northampton Lunatic Asylum, there is a resident chaplain, who has unlimited access to the wards, and daily reads prayers, forming part of the church service, to a considerable portion of the inmates. We have been assured that the result has been highly beneficial. It is quite obvious that great discretion is called for in such an appointment, and that an incautious or fanatical person might occasion great mischief, but a sensible and judicious clergyman would find many opportunities of tranquillising the minds of those over whom his sacred office gives him more or less influence; and independently of other considerations, the regular attendance of patients on religious services has the effect of inducing habits of composure, and assists to preserve self-command, which must have a salutary tendency, and we have received repeated testimony that such has been the re-

<sup>1</sup> As to the extent to which religious services are now afforded, see Report of Metropolitan Commissioners for 1843, p. 159. See also 2 & 3 W. 4. c. 107. s. 37. and 8 & 9 Vict. c. 100. s. 64., which imposes on the Commissioners the duty of making inquiry as to what religious instruction lunatics receive in the asylum.

sult." It is further to be observed that in Scotland, access to the patients has been permitted for a considerable time, under order of the sheriff, to clergymen of every creed to visit members of their respective persuasions; and the principle was admitted and extended in a bill brought in last spring by the Lord Advocate. Your Committee are therefore anxious that the procuring the regular visits of the clergy should be rendered indispensable to the granting of any licence to a lunatic asylum. For it is obvious that the regular visitations by the clergy of these asylums would act as a great but effectual means of control on the whole establishment, and they would also be the best depositories of any abuse, real or alleged, committed on any of the inmates.

At the same time, although your Committee are of opinion that this visitation by the clergy would be of great advantage in many ways, medical, moral, and controlling, yet they also recommend that the visiting clergyman ought not to be any one who may chance to be in the neighbourhood, whose attention must be more or less casual, but a responsible paid chaplain selected for the office on account of his possessing the necessary qualification for the due discharge of so delicate a duty.<sup>1</sup> It would seem most proper to vest this appointment in the county or borough magistrates, and that the payment should be made by the proprietor of the asylum to the county fund for the use of the clergyman.

On the necessity of independent supervision your Committee would call the attention of the Society to the following passage in the Report of the Commissioners in 1847. "It is indispensable that powers of supervision should exist in every case, that they should be vested in persons totally unconnected with the establishment, and that the visitation should not be limited in point of number, and should be uncertain in point of time, for it is most important to the patients that every proprietor and superintendent should always be kept in expectation of a visit, and should thus be

<sup>1</sup> In this recommendation, the Committee have adopted very nearly the words of a letter on the subject addressed by the Bishop of Winchester to the Rev. C. Lane, a member of the Society, and which was placed at the disposal of the Committee.

compelled to maintain his establishment and its inmates in such a state of cleanliness and comfort as to exempt him from the probability of censure. We are satisfied from our experience, that if the power of visitation was withdrawn, all or most of the abuses that the parliamentary investigations of 1815, 1816, and 1827 brought to light would speedily revive, and that the condition of the lunatic would be again rendered as miserable as heretofore." (P. 93.)

On this head of further regulation your Committee wish also to observe, that while asylums having two or more patients have been the subject of statutory visitation, no sufficient provision is made for the regulation of houses where only one patient is received. These houses this Committee believe are very numerous, especially in the neighbourhood of London, and in some of them many of the abuses which it has been the object of the legislature to abolish still exist. It may be admitted that in many cases the patient who can afford it is much better and more considerately attended to at an establishment of this nature; and, further, that the seclusion and retirement that he may here meet with is not only better adapted to his mental suffering, but is calculated to restore him to health. Still making due allowance for these advantages, your Committee are of opinion that it is necessary that some further regulation should be made as to this class of asylums, and they feel disposed to recommend that a regular<sup>1</sup> visitation should be extended to them.

Your Committee would also offer the following recommendations on this head:—That the persons employed by the keepers of asylums to effect the caption of lunatics should be placed on a register to be kept by the Commissioners in Lunacy, who should receive complaints as to their misconduct, and have the power of dismissal; that the original order and certificates (and not copies only) should be deposited in the offices of the Commissioners in Lunacy, and not be given to the custody of the keepers of the asylum; that in

<sup>1</sup> See as to these houses, 8 & 9 Vict. c. 100. ss. 90—93., and the Fourth Report of Commissioners (1847), 27, 28.

case of any sudden death of a patient taking place in a lunatic asylum, a coroner's inquest should be held, and that the result should be sent to the Commissioners in Lunacy; that no license of an asylum should be granted except to a duly educated medical man; and that some further regulation should be made as to enforcing the residence of the proprietors of private lunatic asylums, which is now only insisted on in the case of a person receiving a licence for the first time after the passing of the late act.<sup>1</sup> It is to be observed that by an ordinance of the 18th December, 1835, art. 30., the keeper of a French lunatic asylum must be resident in the establishment; and if he is not himself a physician, he must, by art. 19., provide a physician, who must also be resident.<sup>2</sup>

In calling the attention of the Society to these various points, your Committee feel they have by no means exhausted the subject of the reference. They have forbore to touch on many of those topics and histories connected with it which appeal to the feelings, which raise the indignation, and excite the horror of mankind. But though they have not thought this Society the fitting place for such recitals, it must not be supposed that they either doubt their truth, or are insensible to their just claims on the sympathies of the Society and the protection of the legislature. They wish however in this, as on all other occasions, to proceed cautiously, and not lightly to recommend alterations in the law, however plausible they may appear to be, without seeing how they may be carried practically into operation. But on the points to which they have adverted in this Report they believe that much benefit would result from specific legislation as to them. Before concluding they would remark, that there is a fourth class of lunatics, viz. those who live under the care of their friends, and who are not placed under the restraint of any lunatic asylum, and are not therefore strictly under confinement. As to this class, your Committee do not conceive that they come within the terms of the present reference, and they are not prepared to offer any observations.

<sup>1</sup> 8 & 9 Vict. c. 100. s. 25.

<sup>2</sup> Pulleine on Foreign Lunatic Asylums.

ART. VI. — FRENCH JUDGES SINCE THE  
REVOLUTION.

WE have more than once adverted to the gross blunders of our good neighbours the French in their jurisprudence, and especially in that most important branch of it, the judicial system. The revolution of last February did nothing to improve those worthy people; on the contrary, we find the most outrageous of all the demagogue acts was pointed to the utter destruction of judicial independence. The Provisional Government, the child of the Revolution, issued a decree that all judges should be chosen by the people, and that all should hold their places during pleasure; thus subjecting every decision of every tribunal, criminal and civil, to the hourly varying caprices of the mob, and making the mob, in fact, administer the justice of the country. How any men of ordinary regard for decency, or for their own character—how such men as M. Arago, or even M. Lamartine—nay, or even M. Cremieux, inconsiderable as he may be reckoned—could put their names to such a decree, it passes our comprehension to conceive. Yet so it is. They signed it, and the unheard of decree, unheard of even in the worst times of Jacobin rule and of the Convention's tyranny, was the law of the land until the new Assembly met in May.

To repeal this law was one of the Assembly's first acts, and its constitution declares the judicial office to be only conferred by the executive government, responsible to the legislature. So far so good. But then it also declares the judges to be irremovable—to hold their high offices for life, or until convicted legally of crime. If this had been really and honestly enacted, and all the existing judges declared independent of the government, all would have admitted that every thing was done which sound principles demanded. But nothing like this was the case; and we question if so gross a fraud was ever practised as this law of the new Con-



stitutional Assembly. The irremovable office was only to be that of the judges *hereafter* appointed! Thus, under pretence of making all judges independent, this dishonest assembly confines the independent office to a hundredth part of their number, making every one of the many hundreds now in office absolutely dependent on the good pleasure of the executive, in whose hands soever that power may be vested.

No one can easily, in this country, form to himself a notion of the eagerness for office which prevails among our neighbours. It is their habit, their nature, or their second nature, to consider that no person has any importance unless he bears some relation to the state; in other words, unless he holds some office under government. The failing of the late Mr. Canning was an extreme lust of place, and this he chose to cover over with the semblance, the outside show, of a principle, as men are too prone to do when they want to gratify a desire. He said no one could efficiently serve his country out of office; he must have power, else he could do little. Hence his life was a struggle to get place and to keep it; nor was there probably ever a poor man more out of his reckoning, than he who thought, when he tried to trip up Lord Castlereagh's heels in 1809, and received a stiff kick for his intrigue, that he should only go out gracefully to come in more powerfully a few weeks after, but who remained excluded six or seven years, the most important of his time, and was only solaced by being sent for to receive the orders, and do the bidding of his rival, as his "most obedient and very humble servant," at Lisbon; while that prosperous competitor was ruling the House of Commons at home. But all this love of place in Mr. Canning was connected with power and splendour. Every Frenchman of any rank above the labourer or the small shopkeeper — every lawyer, every author — all the class of proprietors, both in money and in land — all whom it is possible to put in any kind of place under the government, are greedy of such advancement in a degree, and with a voracity far beyond what our English habits and tastes render easily conceivable — and a voracity very far from keeping any proportion at all to the value of the post so fiercely desired. It is not the

gain; it is not the patronage, which is little; not the power or influence, which is none — but the vanity gratified, the importance bestowed by being a public functionary; by having some connexion, how humble — nay, how mean soever, with the state. In old times, the public executioner used to appear with a bag and a sword in some turns on the public walks; and we doubt if it would be difficult to find men who had rather hold that last of places under the government than lead a wholly placeless existence.

This strange desire of office, so very different from anything seen among ourselves, is partly, no doubt, owing to the small incomes of independent men; the non-existence of landed gentry; the abolition of all feudal rank; the extreme insignificance of the peerage, even before late changes; the impossibility of any one obtaining distinction by the independent exercise of his individual rights. “M. le Juge,” “M. le President,” “M. le sous-Prefect,” “M. le Conseiller,” are titles which, on the individual's entrance, fill the ears of the assembled society, and the sound tickles those of the happy functionary himself. The judge, in this way, finds himself in company with men of much larger income as well as far more talents than himself, but all of whom he is used to regard with the eyes of the multitude, who care for nothing but official rank. While he practised at the Bar, his income was double or treble what he receives as a judge; but his importance was nothing. Elected to the Bench, he may have no more than the wages of an upper servant in England, or he may have double their wages; but he is a judge, and that is enough. As long as he remains on the Bench his place in society is assured; he is respected; he is looked up to; he is part of the state, the object of all men's devotion. Remove him, and he sinks into absolute insignificance. Nay, let him have regulated his whole judicial career by the greatest integrity, the most profound learning, the most extraordinary perspicacity, he becomes of no more importance, the morrow of his descent from the Bench, than the grocer who lives in the next street; and all men's respect is forthwith transferred to his unknown, it may be his incapable successor.

Need we say more to show how powerfully the right of remaining a judge must operate in favour of the government and against the judge's independence. In England, we most justly consider as the best gift of the Revolution, 1688, the securing the independence of the judicial body. Yet, what was the judge's dependence with us compared with that position of absolute subordination which we have just been contemplating? An eminent lawyer, taken from the Bar and restored to his lucrative and honourable profession for doing his duty honestly and fearlessly in the Bench, presents rather an enviable object to our contemplation. In France, besides that the judge, in most cases, never had professional eminence on which he can retreat, he loses all the respect with which he had been encircled while he filled the Bench. He sinks into a private and an obscure, possibly a despised station; he is for ever extinguished. To avoid this grievous infliction what pains will he not take! — what circuitous paths pursue to avoid giving offence! — what scrupulous care, not use, to trim his words with all tenderness for the feelings of the men that rule! — what efforts leave untried to conciliate the powers that be! In political cases how surely will his sentiments go along with those of the government! How steadily will his principles be squared by the rule and the plumb line of the existing administration! "It is not corruption" — "it is not subserviency." "Such are his real feelings — his independent opinions. Were he to speak or to act otherwise, he would be a dishonest, and not an independent man."

In examining the great matters — the most grave of all — connected with judicial independence, we must never lose sight of one obvious consideration. A judge is not independent and honest who merely avoids committing gross and flagrant infractions of the law or violations of justice. Cases but rarely occur when any government can require any judge — can even secretly wish any judge so to stain the ermine. Most governments would lose fully more than they could gain by exacting such base compliances. But there are thousands of ways in which obsequious servility can help its masters without glaring exposure of itself. A formidable

advocate may be thwarted ; a feeble adherent may be patronised ; a number of advantages, each nothing in itself, may be given to the executive as a party ; and yet all these advantages together may decide the cause, or, without deciding it, may bring incalculable benefit to the government in saving it from difficulties. And all these advantages may be given in the execution of the judicial office, no doubt, but in deciding points ruled by no positive law — matters left by the law to the discretion of the judge. Never let it be forgotten that every system of jurisprudence abounds, and must of necessity abound, in such matters, which the mere discretion of the courts alone govern. Well, then, in all these — and they are of the greatest moment to the rights of parties and the due administration of justice — there is the greatest latitude allowed for the judges to decide as they please ; and in all such cases it is of the last importance that no judge should have the very least fear of the government, the very least personal interest to decide one way rather than another.

Then only consider how the hundreds of French judges now under the absolute power of the executive are likely to decide, wherever that government has any interest to serve, any wish to gratify. Every one of these judges knows how anxious each succeeding ministry must be for vacancies, in order to promote its adherents. Every one of them knows that his utmost care to avoid offence, nay, his utmost zeal to give satisfaction, can alone save him from the fate which he deems the very last of calamities, the annihilation of his whole personal importance, by the loss of his judicial station. It is hard to imagine a judicial body more exposed to temptation, more enthralled by dread of giving umbrage, than the 1500 judges of France now are, in consequence of the most vile fraud practised by the incapable Assembly which has lately been misgoverning that ill-fated country. We express ourselves strongly as we strongly feel on this most important subject. We sincerely think that no assembly assuming to govern any free country, ever was guilty of so foul an offence against all just principle, or ever sought to cover that offence under a mask of such disgusting fraud.

In truth, this Assembly was elected under an influence of

two kinds: the disgust felt at the recent revolution by all respectable men, and which kept them at a distant from the election, and the active exertions of the commissaries, or prefects, appointed by that unprincipled man, Ledru Rollin. Of these it is now notorious that six or seven were actually galley slaves who had escaped, or had been discharged after performing the works, to which for thefts and murders they had been sentenced; others were men of the most noted incapacity, and who were appointed as a bribe to others too scandalously unfit for promotion, for instance, a young man of the second city of France, Marseilles, where his father edited an extreme paper, and had been disgraced by a fraudulent bankruptcy. Some were named for the all but avowed profit of Ledru Rollin himself; as the man whom he had charged in a Court of Justice with embezzling the funds of his (Ledru's) paper *La Reforme*, to the amount of 20,000 francs, and whom he soon after appointed a prefect, manifestly to put him in possession of funds for paying back the sum stolen. Many were sub-editors and agents of the favourite *National* or *Reforme* papers. All these men made up by zeal and unscrupulous activity in their employer's favour, and that of the violent party, for all other deficiencies. These men openly canvassed and openly influenced the votes of the electors; nor let any one condemn the power of official interference upon every poor peasant, every day labourer, every common porter, carman, scavenger, having as telling a vote as the first man in his town. The prefects of the department are known to have issued direct, from the Hotel, official proclamations, officially signed by themselves as prefects, recommending General Cavaignac (the favourite of the extreme journals) and attacking his adversary. Then can any one doubt that the same functionaries exerted the same official influence to direct the choice of elections in May? The Assembly thus returned has shown the most devoted zeal in favour of the party which chose it, and the most unscrupulous disposition to do the government's bidding. They have even usurped the powers of the constitution; for having made a scheme of government, (and such a scheme as for crudeness, passes all former revolutionary experience!)

they persist in continuing to sit and vote under pretence of making organic laws, and one of these is the repeal of a duty which yielded near two millions sterling yearly revenue to their bankrupt treasury, a law as little organic as it is wholly disorganising to their system of finance. They are extremely wroth with the whole people for having rejected their newspaper candidate. They have had an all but unanimous vote of distrust and censure passed on their whole conduct. They are well aware that they can never hope again to be elected, and so they make the most of their present existence, and of the *twenty-five* francs a day, which they hold still dearer than their political power, and which they positively refused to give up when an honest workman reasonably enough proposed to suspend that ample payment as long as they absented themselves from their post, which many did for six weeks, and yet insisted on being paid forty guineas for that time. They must go, however, at last. The public voice, which has long condemned them, is now raised to demand their dissolution, and they will find their trick of depriving the President of the dissolving power, too flimsy to screen them from popular indignation should they not speedily give place to better men, — worse could hardly be found.

Let us hope that their manifold errors may be corrected by their successors! But their successors will have much to do. The independence of all judges must be established; care must be taken to regulate the legislative proceedings, so as to give time for correcting blunders, as the constitution has already rejected a second Chamber, the only real safeguard against such great mischiefs; above all things, they must resolve to comport themselves with the decorum becoming a deliberative body, and not like a mob, as the Constituent Assembly has frequently done.

In making these reflections, we must be permitted to express our grievous disappointment at the conduct which M. Dupin has, unhappily for his country, but not less so for his own fame, thought fit to pursue. Who so likely as he to show himself above a vile submission to the outcry of the republican mob! who so independent as he of all influence, all constraint, and so free to express his deliberate opinions!

Yet he it is who, while the Thiers, the Berryiers, the Molès, the Odillon Barrots, all support the principle of a second Chamber, is found alone to join in the aversion of the populace to that salutary, nay necessary, precaution against rash measures! This is a painful subject, and we willingly leave it.

If we are asked what hopes we have of settled government under the newly chosen President, we say, but slender. A man of no capacity, of only one qualification, his bearing a great military name, with no military renown any more than civil, can only supply all other deficiencies by the possession of extraordinary firmness, and showing a fixed resolution to be governed by no person of indifferent repute. We fear he has as yet shown no such resolution; we know that his "*entourage*" is much despised; we regard him only as an intermediate occupant of high place, until stronger men put him down and occupy higher.

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#### ART. VII. — NAVAL PRIZE.

IN a former Volume<sup>1</sup> of this Review we inserted a sketch of the Law of Naval Prize, as it operates between the Crown and the captors, and between the captors and the enemy. It remains now to take a view of the rights of the captors as between themselves; and in treating this subject, the distribution of prize money, and the adjustment of the claims of the various parties seeking to participate in such funds, will come under consideration.

"The Act of Parliament and the proclamation," (says Lord Stowell) "give the benefit of prize to the *takers*, by which term are naturally understood those who *actually take possession*, or those affording an actual contribution of endeavour to that event. Either of these persons are naturally included under the denomination of *takers*; but the Courts of law have gone further, and have extended the term *taker*

<sup>1</sup> L. R. Vol. viii.

to another description of persons — to those who, not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captor, or intimidation to the enemy.”<sup>1</sup> Hence has arisen the naval doctrine of joint capture, which has been such a fruitful theme of discussion in the Courts of Admiralty. Capture, therefore, is now systematically divided into the two forms of *actual* capture and *constructive* capture; but upon every occasion the burden of proof is thrown upon those who claim as constructive captors, because they are not strictly within the words of the Prize Acts of Parliament, and the assertion of their claims obviously tends to narrow the rights of the actual takers, whose claims are indisputable.

Joint captors are entitled to share according to their respective forces present at the capture<sup>2</sup>; and the principle of the same rule applies also as between privateers, which share according to the number of men on board each ship, unless there has been any agreement or stipulation for some other specific mode of distribution.<sup>3</sup> The portion allotted to each privateer is divisible according to the ship’s articles, which usually reserve a considerable benefit to the owners.

Where a tender of one ship is joint captor with another ship, the prize is shared proportionably between the capturing ship and the tender, according to their respective forces; and the tender’s share then becomes distributable, according to the King’s proclamation, among the whole company of the ship to which she belongs. This rule of prize law was recognised in 1830 by Sir Christopher Robinson, Judge of the Admiralty, in the case of the *Zepherina*<sup>4</sup>, a slaver, captured in 1823, after a joint chase by H. M. S. *Primrose*, and H. M. armed brig *Black Joke* tender, belonging to and officered and manned from H. M. S. *Sybille*, Captain Collier, Commodore of the African squadron; the *Sybille* sharing only in the proportion earned by her tender. And the same

<sup>1</sup> 2 Robinson’s Adm. Reports, 21.

<sup>2</sup> The *Zepherina*, 2 Haggard’s Adm. Reports, 320.

<sup>3</sup> *Roberts v. Hartley*, Douglas’ Reports, 298.

<sup>4</sup> 2 Haggard’s Adm. Reports, 317.



rule applies where a ship's boats are pronounced to be joint captors with another ship.<sup>1</sup>

The theory of joint capture was formerly held to apply only to claims founded on actual co-operation; but in consequence of frequent litigations it was extended to cases of constructive assistance, for the purpose of preserving harmony and a good understanding in the navy. *The being in sight* became then the principal criterion; that circumstance being always allowed to be sufficient, unless there was any thing to rebut the general presumption of intimidation and encouragement proceeding from it. The principle of the rule is, that it is the bounden duty of king's ships to avail themselves of every opportunity to engage the enemy; and it is, therefore, only common justice to presume, until the contrary be proved, that they have both the intention and the capacity to fulfil this primary and obvious duty. In consequence, the *animus capiendi* is always imputed to them; so that "there can be no doubt," says Lord Stowell, "that sight alone is, between king's ships, *generally* sufficient to establish a claim of joint capture. By sight, I understand the being seen *by the prize as well as by the captor*, and thereby causing intimidation to the enemy, and encouragement to the friend. I am not aware that one of these will do without the other." Accordingly, in the case of the *La Flore*<sup>2</sup>, a vessel captured by the *Trimmer* privateer, H. M. S. Hussar was admitted to share as a joint captor, on the sole ground of being in sight, without even a suggestion of joint chasing or other positive co-operation.

Again, H. M. S. Dictator, Alfred, and Bittern, having come in sight of Trinidad on the day of the capitulation of that island to the British forces employed in its reduction, were on that ground alone held entitled to share in the capture of the island, although they were not allowed to share in the capture of the enemy's ships, which were taken by the operations of the squadron on the previous evening.<sup>4</sup> So

<sup>1</sup> The *Odin*, 4 Robinson's Adm. Reports, 318.

<sup>2</sup> 2 Dodson's Adm. Reports, 125.

<sup>3</sup> 5 Robinson's Adm. Reports, 268.

<sup>4</sup> The *Island of Trinidad*, 5 Robinson's Adm. Reports, 92.

also where the prize was taken by the boats of a privateer in the road of Alderney, in sight of *H. M. S. Swift*, whilst the privateer and the *Swift* were both at anchor and becalmed; the *Swift* was held entitled to share as a joint captor, although her commanding officer, Lieutenant Mounsey, had gone ashore, and was not on board at the time of the capture. It appeared, however, that before Lieutenant Mounsey went ashore, the prize had been an object of attention to the *Swift*; that he left directions to board her at a proper time, and for a signal to be made to him in case she should weigh anchor; and that when the privateer's boats were seen to go off to the prize, preparations were made on board the *Swift* to aid them in case of resistance, and to prevent an escape. Under these circumstances Lord Stowell pronounced in favour of the claim of the *Swift*.<sup>1</sup> The cases cited are quite sufficient to exemplify the rule; but many others to the same effect will readily be found in the Admiralty Reports.

Positive or actual sight, at some part of the transaction, is of the essence of this species of claim, though it is not required that it should be at the moment of capture. It is enough to have been in sight during a chase. But the mere circumstance of being within such a distance as would admit of sight in clear weather, would not support such a claim without proof of actual sight. It would put this rule of law on a very uncertain footing, to which no rational principle or satisfactory proof could be applied, if a Prize Court had to determine on the state of the atmosphere, and on the loose conjectural evidence which might be given in regard to it, or upon the questions whether the distance was a proper distance for sight, if the weather had been clear, and what, under such a state, could be the impression on the mind of the enemy or the friend.<sup>2</sup>

The sight also which is necessary to support a claim of constructive joint capture, must be from the deck. "I am not aware," says Lord Stowell, "of any one instance in which the Court has pronounced for a joint capture on being in

<sup>1</sup> *The Drie Gebroeders*, 5 Robinson's Adm. Reports, 389.

<sup>2</sup> 3 Robinson's Adm. Reports, 316.

sight only from the mast head. I do not say that such a case would be entirely and absolutely out of the reach of the principle on which the being in sight is admitted to constitute an interest of joint capture; but this may be safely affirmed, that if the Court was to pronounce for such a claim on such evidence, it would be in all respects a very extreme case indeed."<sup>1</sup>

The Court of Admiralty expects also that the being in sight, at some time before the surrender, should be proved by some direct evidence applying to the fact, and not merely by opinions or conjectures. Thus, upon the capture of *Trinidad*, where a Spanish squadron surrendered to the British fleet under Admiral Harvey, proof of H. M. S. *Zephyr's* arrival in time to see the remains of a frigate burning, was held not to be sufficient evidence of having been present at her destruction.<sup>2</sup> In the same case it was attempted to support the claim of H. M. S. *Zephyr* and *Pelican* as joint captors with the squadron actually engaged, by proving that the *Zephyr* and *Pelican* were within hearing of the explosion when some of the enemy's ships were blown up. "But," said Lord Stowell, "it is a common phrase, not more contemptible for being common, that *hearing is not seeing*: the explosion of such a body as a ship of war would be heard to a stupendous distance. It is a well-known fact, that in the famous battle in the Downs the explosion was heard in St. James's Park, and was made the foundation of a mathematical calculation by Sir William Petty, with respect to the velocity of the progress of sound. So with regard to the conflagration the atmosphere would be illuminated to a prodigious distance; but it would be ludicrous to say that all who were within reach of these appearances, produced by the fire, are to be taken in law as present at the occurrence itself."<sup>3</sup>

Sight, however, even if proved in the most satisfactory manner, does not universally give a right to a man-of-war to share in a prize. The circumstance of being in sight, coupled with the known duty of ships of war, creates certainly a strong presumption that the friend was encouraged, and the

<sup>1</sup> 5 Robinson's Adm. Reports, 199, 200.

<sup>2</sup> *Trinidad*, 5 Robinson's Adm. Reports, 92.

<sup>3</sup> *Ibid.* 95.

enemy intimidated. But the presumption thus arising, in favour of a claim of joint capture, may be rebutted, like all other presumptions, by circumstances showing that the presence of the claimant did not afford encouragement to the actual captor, nor intimidation to the enemy. Thus where it can be shown that a ship of war in sight of a chase or combat made no actual contribution of endeavour, and had no intention of so doing, whether by being wholly employed in another service or otherwise, the rule as to being in sight ceases to operate, and such a vessel cannot claim a share as a joint captor.<sup>1</sup> This was the case of *H. M. S. Leviathan*, which was not admitted to share in the *El Rayo*, a Spanish 100-gun ship, taken without resistance, at a short distance from her, by the *Donegal*, on the morning after the battle of Trafalgar; the *Leviathan* being employed in taking care of other ships and prizes captured in the battle, and her attention being also directed to the movements of the *Monarch*, another Spanish ship.<sup>2</sup> Again, in a case where *H. M. S. Viper* had reconnoitred the chase before her capture, and had stood off on another course, but nevertheless claimed to share in the prize on the ground of having been in sight; Lord Stowell said, that without laying down any general rule to govern *all* cases of ships steering a contrary course, he would venture to say, that to pronounce for the *Viper's* claim would be to carry the interests of joint capture to a greater extent than had ever yet been done. There was no *animus capiendi* even to be presumed in the case.<sup>3</sup>

Again, with respect to blockading ships, the presumption of joint capture by being in sight is not raised in their favour. Such ships are at liberty to take a prize, if it comes in their way; but they are not to chase to a distance; for that would, in effect, be a desertion of the duty imposed upon them, and would amount to a breaking up of the blockade; it not being usual to employ more ships than what are absolutely necessary in such a service.<sup>4</sup> Therefore, where such a force is employed to blockade an enemy's squadron in a harbour, a

<sup>1</sup> *El Rayo*, 1 Dodson's Adm. Reports, 42.

<sup>2</sup> *Ibid.*

<sup>3</sup> *The Lord Middleton*, 4 Robinson's Adm. Reports, 153.

<sup>4</sup> 2 Dodson's Adm. Reports, 130.

claim of joint capture, on the part of ships so employed, cannot be sustained; for they are, as sentinels on their post, watching over prisoners anxious to run away; and it cannot be presumed that so important a duty would be neglected, when its main object would be liable to be defeated on the slightest relaxation of the rigour of the blockade. This was accordingly so decided in the case of *La Melaine*, a French prize<sup>1</sup>, taken on the 8th September, 1813, by H. M. S. *Briton*, Capt. Sir Thomas Staines, when a claim of joint capture, by reason of having been in sight, was made by a squadron consisting of H. M. S. *Ville de Paris*, *Warspite*, *Rippon*, *Sultan*, and *Rover*, lying at anchor in the Basque Roads under the orders of Rear Admiral Sir Henry Neale, and employed in blockading the enemy's ships at the Isle of Aix. Lord Stowell, however, upon a review of the evidence, considered that the claim, so far as it was founded on *sight*, was as indistinct and distant as any that he ever remembered; and after observing that the squadron (of which the *Briton* was not a member) was engaged in a blockade of the strictest kind, against at least an equal number of ships, which rendered it imperative on them not to desert their post, and that they were also lying at anchor, with sails furled, in the bottom of a bay, into which the wind was blowing strong, his lordship decided in favour of the exclusive claim of the *Briton*.

Lord Stowell has also pronounced that, where a claim, founded on the fact of sight, is made by vessels lying in a harbour, some such limit as this must be assigned to their claim — namely, that they must be in sight when the capture is consummated; otherwise cases of the greatest hardship on the actual captors might frequently occur. Suppose, for instance, the case of a prize chased all the way up the Channel, would it not be monstrous, remarked his lordship, to say that all the ships in all the different harbours which they passed, and which happened to see a part of the chase, should be entitled to share with the actual captor? The utmost that can be admitted is, that those ships alone which witnessed the last act of the chase, the consummation of the capture, should have a share of the prize.<sup>1</sup>

<sup>1</sup> 2 Dodson's Adm. Reports, 122.

<sup>1</sup> Ibid. 126.

The same learned judge, on another occasion, put the question — where a ship of war, being *in itinere*, but barely seeing or hearing a firing on the coast which she is passing in the prosecution of her voyage, without at all knowing the occasion of such firing, is entitled to share in the beneficial effects of an attack made by a force with which she has no communication or concert whatever. “To say that she would be so entitled, appears to me (said his lordship) to be going farther than has hitherto been done in any case with which I am acquainted.”<sup>1</sup>

A claim of joint capture has never been supported, unless it has appeared that the ship asserting the claim was known by the enemy, as well as by the friend, to be in chase. It is therefore essential to show either that the claimant was in sight at the time of the capture, or that the captured vessel knew her to be in chase; and, if known to be in chase, the accidental prevention of sight, by an intervening fog or headland at the moment of surrender, will not bar the claim<sup>2</sup>: because the impulse and impression on the mind of the enemy who is to be intimidated, or of the friend who is to be encouraged, continue in full force, and thus support the principle on which the doctrine of constructive assistance is built.<sup>3</sup>

By the last Prize Act (55 Geo. 3. c. 160. s. 15.), commanders of men of war, or hired armed vessels in the service of the Crown, having merchant ships under convoy, were prohibited from sailing away in pursuit of an enemy's ship (except vessels of war hovering about or bearing down upon the convoy), and from deserting the convoy for the hope of carrying into port any prize actually captured. Commanders of ships having despatches of the Crown on board were, by the same act, prohibited from sailing out of their course in pursuit of or for the purpose of making prizes. The penalty for these offences was the forfeiture of all share in prizes thus taken to the use of Greenwich Hospital. The same act provided also (s. 16.), that privateers under the convoy of men-

<sup>1</sup> 2 Dodson's Adm. Reports, 92.

<sup>2</sup> 5 Robinson's Adm. Reports, 121. 128.

<sup>3</sup> 3 Ibid. 316.

of-war should not share in prizes taken by such men-of-war, or by the privateers themselves, unless the latter were ordered into chase by the commander of the convoying ship.

A convoying ship may nevertheless take a prize, as well as any other ship of the royal navy, provided the capture can be effected without sacrificing the convoy: and such a vessel is entitled to all the benefits of constructive as well as actual capture, if she is in sight, or otherwise contributes to the intimidation of the enemy. This was decided, in the case of a claim made by her *H. M. S. Cressy, &c.*, under the command of Captain Charles Dudley Pater, proceeding up the Baltic with a large convoy of merchantmen, to share in captures made by *H. M. S. Courageux, &c.*, then in sight with another large convoy.<sup>1</sup>

In thus administering the law of prize, the Courts have carried the application of the word "take" to an extent probably not within the contemplation of those who first used it, and, in many cases, the rule affects very seriously the interests of meritorious captors; but it is supported by the equity of an universal application, giving possibly an equal benefit to the same meritorious captors in other cases, where, but for this same rule, they would take no benefit at all.<sup>2</sup>

Such are the ordinary rules and principles of joint capture. But in order to avoid the hardship occasionally resulting from their enforcement, the actual captors have in some instances resorted to frauds or artifices to defeat the constructive claims of other ships to share in their prizes. The recorded cases of this nature do not appear to have arisen on the part of the ships of the royal navy, where a high principle of public duty prevails; but where such conduct is proved, the Court of Admiralty strenuously prevents its success. Accordingly, in the case of the *Herman Parlo* in 1785, it was suggested that the actual captor had extinguished his lights in order to prevent other ships from seeing the chase or capture; and the Court held that no effect should be given to conduct of this sort, and that the other ships claiming to be joint captors,

<sup>1</sup> Galen, 1 Dodson's Adm. Reports, 429.

<sup>2</sup> 2 Dodson's Adm. Reports, 302.

though not actually in sight nor in chase, should share in the prize.<sup>1</sup> So also where the capturing ship made signals of recognition to two others in sight during the chase, but did not make the signal of an enemy in sight, Lord Stowell held that this was evidence of fraud, which, if supported in other respects by proof of wilful deception, or culpable neglect or inattention, would entitle the claimants to share in the benefits of the capture.<sup>2</sup> Sailing on a contrary tack from the enemy, with a view to mislead other ships in sight, and exclude them from sharing in a capture, is also a fraud, to which the Court of Admiralty will never give effect.<sup>3</sup>

With respect to captures of slave ships under the authority of the Acts for the suppression of the slave trade, Lord Stowell, in the case of the *Aviso*<sup>4</sup>, intimated an opinion, that the law of joint capture ought not to be carried to the extreme length to which the principle of capture by mere or accidental sight has been carried in prize law, and which his Lordship considered it to be not the policy of later times by any means to favour. Actual co-operation to some extent is, therefore, presumed to be necessary upon such occasions. And the following very special case, in which a claim of joint capture of a slaver came under adjudication before the present distinguished Judge of the Admiralty, seems to afford an illustration of this position. A Brazilian slave ship, the *Sociedade Felix*<sup>5</sup>, was taken by H. M. S. *Harlequin*, and condemned by the Mixed Commission Court at Sierra Leone. A claim was made by H. M. S. *Forester* to share in the capture, on the principles applicable to joint capture in time of war. The two vessels were lying together off Cape Palmas, and the prize was first seen by the *Harlequin*, which immediately gave chase, her commander, Lord F. Russell, at the same time signalling the *Forester* to remain behind and pick up the *Harlequin's* boats. All opportunity of actual co-operation in the chase was thus taken away from the *Forester*, by the order which her commander, Lieut.

<sup>1</sup> 3 Robinson's Adm. Reports, 8.

<sup>2</sup> The *Waaksamheid*, *Ibid.* 1.

<sup>3</sup> The *Robert*, *Ibid.* 195.

<sup>4</sup> 2 Haggard's Adm. Reports, 31.

<sup>5</sup> The *Sociedade Felix*, 2 W. Robinson's Adm. Reports, 155.



Bond, was bound to obey. By executing that order, and picking up the boats, the officers and crew of the *Forester* contended that they rendered a virtual assistance to the *Harlequin* in expediting her progress, and consequently in facilitating the capture. The *Forester* was actually in sight of the prize at the commencement of the chase; and was presumed to have been so at the time of the capture, as the chase was confined to the space of only nine or ten miles from the spot where the prize was first desoried. The *Forester* was also able and willing to have joined in the chase, if she had not been prevented by the order referred to; and being a ship of war employed in the suppression of the slave trade, the *animus capiendi* in regard to the prize could not be questioned. On the foregoing grounds the officers and crew of the *Forester* argued that it would be a great hardship to deprive them of their title to share as joint captors, merely for their obedience to the orders of Lord F. Russell: and they succeeded in establishing their claim.

Dr. Lushington: "Lord F. Russell himself admits that he ordered the *Forester* to remain and pick up his boats. This order, which the *Forester* was bound to obey, and which she did obey, in my opinion, is a most important ingredient in the case. What is the legal effect of such an order? Is it not rendering *an assistance* to the *Harlequin* towards the capture of the slaver? Could the *Harlequin* have gone in chase if the *Forester* had not been there—at least until she had picked up her boats? I have but little hesitation in coming to the conclusion that she could not. If the fact be so, the practical effect of the *Forester's* obedience to the order in question was to accelerate the operations of the *Harlequin*, and consequently to contribute some assistance towards the speedy chasing and final capture of the prize. The order so given by Lord F. Russell was not alien from the object which he had in view; viz. the capture of the vessel which was desired. On the contrary, the order was directly auxiliary, and the performance of the order was co-operative to the attainment of the object proposed. The present is in this respect widely distinguishable from the case of a superior officer giving orders for a separate and

distinct service, necessarily removing the ship from the scene of operation. Now, if to the circumstance to which I have just adverted, there should be added proof of sight at the time of capture, and the possibility of the Forester's joining in the chase and capture, unless prevented by the order of Lord F. Russell; I am clearly of opinion that these facts, taken together, would constitute a sufficient claim to entitle the Forester to share in the money to be distributed. [The learned Judge then recapitulated the evidence on the points just referred to, and thus proceeded.] That the Forester saw the *Sociedade Felix* is beyond all dispute, and although from circumstances stated in the evidence, there might have been greater difficulty in the *Sociedade Felix* seeing the Forester at the time of the capture; there is, I conceive, sufficient reason to conclude that the Forester might have been seen; and I am disposed to hold that this would be sufficient where sight at an earlier period is established. It is not, I apprehend, absolutely necessary under the circumstances here stated, that sight at the actual time of capture should be proved. I am inclined to think that such proof is unnecessary where detention in the service of the actual captor is completely established, as it is in the present instance. . . . My judgment will be founded on the facts which I consider to be established by the evidence on both sides. Looking at these facts, I hold that the Forester is entitled to share. I am most desirous that it should be distinctly understood, that my decision is founded upon the *union and combination of all the circumstances of the case, and not upon the one or the other of them singly*. I am also further desirous that it should be understood, that in forming my decision I have not ventured to pronounce any opinion upon one point which has been raised in the argument; viz. that the Forester was bound not to chase without an order from the senior officer on the station; and that having remained at anchor, as it were by compulsion, in consequence of no such order having been given, she was upon this account entitled to share. This is an important point, which I am not called upon to determine upon the present occasion; and

I therefore leave it untouched, as a point which may be fully open to discussion on any future occasion."

The rule of sight, however, does not prevail in favour of privateers; for sight alone is not sufficient on the part of such vessels to raise the presumption of co-operation. "They clothe themselves (says Lord Stowell) with commissions of war from views of private advantage only. They are not bound to put their commissions *in use* on every discovery of an enemy; and therefore the law does not presume in their favour, from the mere circumstance of being in sight, that they were there with a design of contributing assistance and engaging in the contest. There must be the *animus capiendi* demonstrated by some overt act; by some variation of conduct, which would not have taken place but with reference to that particular object."<sup>1</sup>

The distinction between public and private ships of war, with reference to claims of joint capture, was laid down by the same learned judge on another occasion in the following terms: "King's ships are under a constant obligation to attack the enemy wherever seen; a neglect of duty is not to be presumed: and therefore from the mere circumstance of being in sight a presumption is sufficiently raised that they are there *animo capiendi*. In the case of privateers the same obligation does not exist. The law, therefore, does not give them the benefit of the same presumption. Ships of this description go out very much on speculations of private advantage, which, combined with other considerations of public policy, are undoubtedly very allowable, but which do not lead to the same inference as that which the law constructs on the known duty imposed on king's ships. A privateer is under no obligation to attack all she meets, but acts altogether on views of private advantage. She may not be disposed to engage in every contest, and therefore the presumption does not arise in any instance that she is present *animo capiendi*."<sup>2</sup>

The allowance of such a presumption in favour of a privateer would be very dangerous. "It would open a door (said

<sup>1</sup> The *Amitié*, 6 Robinson's Adm. Reports, 261, 264.

<sup>2</sup> 5 Robinson's Adm. Reports, 269.

Lord Stowell) to very frequent and practicable frauds, if, by the mere act of hanging on upon his majesty's ships, to pick up the crumbs of the captures, small privateers should be held to entitle themselves to an interest in the prize which the king's ships took."<sup>1</sup>

When the *Odin*<sup>2</sup> was captured off St. Helena by the boats of H. M. S. *Trusty*, a claim of joint capture was made on the part of the Royal Admiral, a private ship of war, on the ground that her boat, which had been sent out from the harbour of St. Helena to assist in the capture, was *in sight* when the capture was effected by the boats of the *Trusty*. Lord Stowell: "I know of no case that would sustain such a claim. The principle of constructive assistance has been altogether thought to have been carried somewhat far; and the later inclination of Courts of Justice has been rather to restrain than extend the rule. Between private ships of war and king's ships, the rule of law has always been held more strictly, and it has not been the doctrine of the Admiralty to raise constructive assistance so easily between them as between king's ships. If the competition had been between two king's ships, it would, in my opinion, be highly questionable whether a boat so sent out could support a title to share on the mere principle of being in sight.

"There is, I think, a very solid ground of distinction between the claims of a boat in the different cases of an actual and a constructive capture. Where a boat actually takes, the ship to which it belongs has done, by means of this boat, all that it could have done by the direct use of its own force. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy, and the encouragement of a friend, from a *ship of war* being *seen*, or within sight of a capture, applies very weakly to the case of a boat — an object that attracts little notice upon the water, and whose character, even if discerned by either of the other parties, may be totally unknown to both. More unreasonable still would this be upon actual captors, if the *constructive* co-operation of such an object would give an

<sup>1</sup> Santa Brigada, 3 Robinson's Adm. Reports, 52.

<sup>2</sup> 4 Ibid. 318.

interest to the *entire* ship to which it belonged. Where a *ship* is in sight, she is conceived to co-operate in the proportion of her force. But what room is there for such a presumption where she co-operates only by the force of her boat? . . . . . I am of opinion, both on principle and authority, that where no antecedent agreement is proved to have taken place, a vessel lying in harbour cannot be entitled to share in a capture made out of the harbour, by the circumstance of her *boat* being merely *in sight*."

In the case of the *Nancy*<sup>1</sup>, another prize taken by H. M. S. *Trusty* off St. Helena, the same question was raised before the Lords of Appeal by the Royal Admiral privateer, stating nearly the same facts as in the case of the *Odin*, but with this addition: that the boat's crew of the Royal Admiral came up *very soon* after the boat of the *Trusty*, and were *admitted on board the Nancy*, and did actually render assistance by navigating the ship into port, and bringing her to anchor in the harbour of St. Helena; and further, that the Royal Admiral and the *Trusty* were both lying at anchor at St. Helena, and were *within sight*, and *seen* by the officers and crew of the *Nancy* at the time of the capture. The Court of Appeal, however, held the circumstances insufficient in law to support the claim of joint capture.

On proof, however, of *bonâ fide* actual assistance to the captors, a privateer will be admitted to share in the prize: and; accordingly, in the case of the *Buen Consejo*<sup>2</sup>, a Spanish register ship of 800 tons and 26 guns, 12-pounders, taken 20th Nov. 1779, by H. M. S. *Hussar*, Captain Salter, a claim of this nature was allowed in favour of the *Resolution* privateer, of 16 six-pounders, Captain Sladen, whose gallantry and perseverance appeared highly meritorious in keeping the prize in chase from the 5th November to the 20th; he having fought her several times, notwithstanding the disparity of force, and having kept constantly up with her, burning false lights, &c. during the night, to attract the notice and assistance of some British cruiser. This conduct of the privateer

<sup>1</sup> 4 Robinson's Adm. Reports, 327. note.

<sup>2</sup> Cited in *The Santa Brigada*, 3 Robinson's Adm. Reports, 52.

was held to have been the principal cause of the capture made by the Hussar, and the claim was therefore adjudged to be perfectly established. So also in the case of the *Amitié*, Lord Stowell being satisfied with the proof of the assistance rendered by the Lark privateer, admitted that vessel to share with H. M. S. Gannet in a valuable French prize.<sup>1</sup>

(*To be continued.*)

#### ART. VIII.—FOSS'S JUDGES OF ENGLAND.

*The Judges of England; with Sketches of their Lives, and Miscellaneous Notices connected with the Courts at Westminster, from the Time of the Conquest.* By EDWARD FOSS, F. S. A., of the Inner Temple. 2 vols. London: 1848.

MR. FOSS has, we think, entered upon an impracticable design, and the specimen he has given us of it in these two volumes is positively alarming. They profess to give the lives of the judges in all the superior courts, in the reigns of the kings of England, from William I. to Henry III., which occupy a space of time not much more than two hundred years. At this period of our history it is not always easy to find out even the name of some of these learned persons correctly, still less is it possible, as to the great majority of them, to discover any distinguishing incident of their lives, or to add by their means any contribution either to the history of our laws or of the constitution. But if the whole subject is to be treated after this fashion,—if every judge of the superior courts, from the Conquest to the present time, is to have his life written, (and *probably* the later the time the longer the life,) we must say that the work will be interminable, and cannot, as we think, serve any very useful purpose. The judges of early times were doubtless very much like the judges of the present day, except that the former seem to have had a somewhat more varied life, and occasionally, as we shall see, commanded a body of archers, jousted

<sup>1</sup> The *Amitié*, 6 Robinson's Adm. Reports, 261.

at a tournament, or, if these amusements could not be had, took to thrashing or even killing one another. But we believe that, making all proper allowance for the difference of habits and manners, the judges of the early Williams and Henries were the same sort of men as the judges of the present day; men highly honourable, very learned, and exceedingly respectable, but whose lives it would really, as a general rule, be ridiculous to write. For what future Foss shall be able to distinguish in our own time, one from another, or tell over and over again how his hero first went to a special pleader, married the daughter of a country squire, rose into favour at Quarter Sessions, became a steady junior on circuit, received a silk gown, and led the circuit for several years, there enjoyed all the honour and dignity of that exalted position, possibly sat some years in Parliament, and ultimately became a judge or baron, — when, after having done much good and little harm, he died or retired and was heard of no more, except among his own family, (where it is of most importance that a man should be well remembered,) who exulted down to the fourth generation in the picture where he stood with his red robe and his ermine tippet? We trust we have all due reverence for the judges — we say with all sincerity that there is no body of persons who reflect more honour on the country, or who better deserve the respect and veneration they receive. And as proof of this we may observe that our financial reformers, who have spared neither sex nor station, who have pointed their reductions at the crown and the ministers, have had nothing to say against the salaries of the judges, but would leave them as they are. They then —

“secured in their existence, smile

At the drawn COBURN, and defy his point.”

But, rejoicing in all this, we must protest against all their lives being written from time immemorial. There would be far more incident in the lives of their footmen; and unless they have associated themselves with the history of their country, — unless they have shone forth as eminent law reformers, authors, or statesmen, or become in some way distinguished from their brethren, we must say that a bio-

graphy composed entirely of them would constitute the most intolerable performance that can be conceived, and would, we are satisfied, be as tedious to the persons whose lives were thus attempted, as to the unhappy reader, if reader could be found. Now if we wanted to prove this, we could not refer to any better evidence than these volumes of Mr. Foss. We give him full credit for considerable learning, extensive reading, and research which may be truly called painful; but a more unreadable biography as a whole, we will venture to say, cannot be produced within the range of our literature. It has undoubtedly some value as giving a more accurate list of the judges than had been previously produced; it contains some meagre notices of the state of the profession, but as holding out "sketches of lives," no title-page was ever more deluding. We regret to be obliged to speak so strongly of an attempt really so well intended, but we are satisfied the work is a mistake; and we feel bound, as well for the sake of Mr. Foss, as for that of the profession, to exhort him to employ his talents, which are considerable, on some more proper and useful subject. Surely with Lord Campbell's seven volumes of the "*Lives of the Chancellors*," and his proposed "*Lives of the Chief Justices*," (which we are glad to see announced,) to say nothing of other recent works giving lives of various eminent judges, the profession is or will be sufficiently furnished with legal biography. If Mr. Foss had turned his attention, and we trust it is not yet too late, to a History of the Legal Profession, he would have supplied a void much felt, and from his learning and antiquarian habits great advantage might have arisen; but if he pursues his present course, we are satisfied that it will lead to no result adequate to the labour. Having come, after much deliberation, to this general conclusion, we shall do Mr. Foss all the service in our power by extracting from his work some specimens of his 'lives,' which we think will go far to prove to our readers his fitness for the task which we have proposed to him, and perhaps to induce them to reverse the judgment we have given, as to which we nevertheless abide.

We shall first slightly abridge the account of Lanfranc,



chief justiciary, which recalls a time when one of the roads to the Bench was through the lecture room, and when a judge did not disdain to be a teacher of the law in the school before teaching it on the judgment seat.

" This learned divine was born at Pavia about the year 1005, and belonged to an illustrious family, which is said to have descended from the Emperors Carus and Numerian. After acquiring some celebrity in his native city, where he was for several years *professor of laws*, his anxiety to travel took him to Normandy, where he first *opened a school* at Arranches, and eventually, about 1042, retired to the poor and lonely abbey of Bee, then one of the most insignificant of the Norman monasteries. Herluin, the abbot, discovering his talents, induced him to resume his office of teacher, and the fame of his lectures became so widely extended, that students flocked to them from all parts; Pope Alexander II. being one of his pupils. He thus diffused a taste for knowledge among the clergy, and to him, in a great degree, is to be attributed the revival of Latin literature and the liberal arts in France. . . . Among the students who came to receive his instructions, there were some who had been pupils of Berengarius, Archdeacon of Angers, who was master of a school at Tours. This desertion exciting the envy of Berengarius, who had propounded some doctrines relative to the Eucharist in opposition to those maintained by the Roman Church, he, in revenge, endeavoured to implicate Lanfranc in the same opinions. Lanfranc, however, had little difficulty, not merely in satisfying the pontiff of his orthodoxy, but in establishing such a reputation at Rome, as to be called upon to refute the obnoxious heresy in the Council then assembled. Duke William, who highly appreciated his talents, took advantage of his visit to Rome by employing him to obtain a repeal of the sentence of excommunication to which he had been subjected by Manger, Archbishop of Rouen, on account of his marriage with Matilda, alleged to be related to him within the forbidden degrees of consanguinity. Lanfranc was successful in obtaining the papal dispensation, accompanied by a condition that William and his wife should each found an abbey at Caen. This injunction they immediately obeyed, dedicating one of them to St. Stephen, and the other to the Holy Trinity. Of the former Lanfranc was appointed the first abbot in 1063, and pursued his lectures there with increased celebrity. The abilities evinced by Lanfranc in this negotiation secured to him the confidence and favour of William, who not only entrusted to him the education of his children, but offered him the archbishopric of

Rouen. This promotion he was allowed to refuse ; but after the Conquest, on the removal of Stigand from the archbishopric of Canterbury, the king, feeling the importance of supplying his place with a man of weight and prudence, faithful to his interests, and equal to the burden, selected Lanfranc as his successor, and overcame the scruples with which the modest abbot resisted his elevation. He was not only willingly accepted by the monks, and approved by the barons and people, but gladly confirmed by the pope. He was accordingly consecrated in August, 1070, and on visiting Rome in the following year, to receive the pall, was welcomed with particular respect by his former pupil, Alexander II., who rose to give him audience, kissed him instead of presenting his slipper for that obeisance, and, not satisfied with giving him the usual pall, invested him with that which he had himself used in celebrating mass. In this visit he defended the rights of the Church of Canterbury against the claims of Thomas, Archbishop of York ; and eventually succeeded in establishing them before the king, to whose decision the pontiff referred the question." (Vol. i. pp. 37, 38, 39.)

Mr. Foss claims the jolly Walter de Mapes (or Map) as a judge, and with the true zeal of an antiquary sets to work to prove that the epithet "jolly" does not properly belong to him. He was a Justice Itinerant, and, with all his faults or alleged faults, we are pleased to find that he was a lawyer.

"He was born on the marches of Wales, probably in the county of Hereford ; but of his parents he states nothing, except that they had rendered important services to King Henry (II.), both before and after his accession to the throne. He studied at Paris, and attended the school of Gerard la Pucelle, who lectured there about 1160. Distinguished as well by his wit and learning as by his courtly manners, he became, on his return, a favourite of the king ; and he repeats conversations he had with Becket before he was made archbishop in 1162. He was employed by the king in missions to the courts of France and Rome, and at the latter he was selected by Pope Alexander III. to examine and argue with the deputies of the then rising sect of the Waldenses. With these proofs of the consideration in which he was held, he received substantial marks of the royal favour. Besides several smaller ecclesiastical preferments, he held, at various periods, canonries in the churches of Salisbury and St. Paul's, was Precentor of Lincoln, and ultimately Archdeacon of Oxford, to which he was advanced

about the year 1196. . . . Some of his writings, which were composed in short rhyming verse, were so popular in his day, that the copies of them were greatly multiplied; and any effusions which were remarkable for their wit and sprightliness, were attributed to his pen. Among the numerous compositions which go under his name, it is difficult to ascertain with certainty how many he really wrote. In the introduction to the collection of poems attributed to him, published by the Camden Society, Mr. Wright gives satisfactory proof that several of those which appeared under the name of 'Goliath Episcopus,' were written by Map; and that Goliath was no real person, as some writers have believed, but a mere fanciful appellation given to the burlesque representative of the ecclesiastical order, and the instrument of holding up to ridicule the vices of the Romish Church. The jovial character of some of these poems has caused him to be considered as a toper, but there is no other evidence to support such an imputation; and the drinking song, which is ascribed to him, commencing thus,

“ ‘ Meum est propositum in taberna mori,’

is a compilation of a much later period, from some lines in the 'Confessio Goliathæ,' containing a mock confession of his three vices, of which one was his love of wine.

“ His prose works are a treatise 'De Nugis Curialium,' and a tract entitled 'Valerius ad Rufinum de non ducenda Uxore;' neither of which have been printed.” (Vol. i. pp. 276—278.)

Mapes was the Rabelais of the twelfth century, and he satirised the lawyers of his day, the priests, just as the latter did both priest and lawyer at a later period.

We must bring in one or two notices of certain fighting judges. Let us begin with Mr. Justice Brus, or Bros:—

“ Robert de Brus was the fifth Lord of Annandale, to which he succeeded in 29 Hen. III., 1245, on the death of his father, Robert the Noble, who, by his marriage with Isabel, the second daughter of Prince David, Earl of Huntingdon and Chester, grandson of David I., king of Scotland, became one of the greatest subjects in Europe. From June till October, 1250, 34 Henry III., there are entries of payments made for assizes to be taken before him, and his name also appears upon fines, showing that he acted as a justicier at that time. There is then an interval of seven years; when, on April 13. 1257, 41 Henry III., he was associated with Simon de Wanton and his companions, justices of the Bench; and in 46 Henry III., had a grant of 40*l.* a-year. Assizes were paid

for, and fines levied before him in 41 and 42 Henry III., and he went the circuit into several counties in 45, 46, and 47 Henry III., in the two latter years being placed at the head of the commissions. In 1263, 47 Henry III., during the contest between the king and the barons, Robert de Brus stood firm to his royal master, *with whom he was taken prisoner at the battle of Lewes*, on May 14. 1264. In October, 1266, 50 Henry III., the payment for assizes before him are resumed, and continue, omitting the 54th year, till August, 1271, 55 Henry III. But on March 8. 1268, 52 Henry III., he was appointed 'Capitalis Justiciarius ad placita coram Rege tenenda;' being the first who was distinctly constituted Chief Justice of the King's Bench. He had a salary of one hundred marks assigned to him; and in the same year he stands at the head of the commissions for visiting several counties." (Vol. ii. pp. 269, 270.)

Hugh le Despencer is, however, a better man still: —

"In the battle of Lewes, fought on May 14. 1264, the chief justiciary distinguished himself on the barons' side, taking prisoner Marmaduke de Twenge, whose ransom was fixed at 700 marks, for the payment of which he engaged his manor of Lund.<sup>1</sup> After the king's defeat, no less than six castles were placed under Hugh's government; and in September he had a grant of 1000 marks for his support in his office.<sup>2</sup> He was also appointed one of the six commissioners to treat with the pope's legate and the King of France, relative to the reformation of the state. It does not appear, however, that any proceedings took place under that commission.

"In the following Michaelmas he was present in the Exchequer; in March, 1265, 49 Henry III., he was a witness, as Justice of England, to the grant of the salary to the Chancellor; and he is so called in another entry in the first week in May.<sup>3</sup>

"In Leland's Collectanea<sup>4</sup>, there is a statement that he afterwards quarrelled with the Earl of Leicester; and it is somewhat curious that in three records quoted by Brady<sup>5</sup>, and dated respectively May 10., June 7., and 8., 1265, the title 'Justiciarius' is added to the Earl's name. This bears the appearance of the re-

<sup>1</sup> Brady's England, Appendix, 243.

<sup>2</sup> Rymer's Fœd. ii. 445.

<sup>3</sup> Madox's Exchequer, i. 71. 76.; ii. 36.

<sup>4</sup> Leland's Coll. ii. 378.

<sup>5</sup> Brady's England, i. 650, 651., and Appendix, 245.

tirement of Hugh ; but as in the following August he was in arms with that nobleman, the difference could not have been of long continuance. The firmness of his friendship was shown at the battle of Evesham, on August 4. 1265, when, refusing to quit the field before it began, though urged by the Earl to do so, he and Leicester were slain together. As a soldier, he seems to have been valiant and bold ; but the few facts that are recorded of him in his capacity of chief justice of the kingdom are marked with the violence and rapacity of the times." (Vol. ii. p. 310, 311.)

It is quite clear that in those days a judge must have made himself ready to do something more than sit down and hear causes. Looking at our present judges, we have often thought which of them would be best adapted for the battle-field, and we are persuaded that no fifteen men could be found more capable of serving their country in this respect than the present Common Law judges. We do not think so highly of all the Equity judges in this respect ; but no one can see the gallant manner in which the former illustrious body of men, or most of them, ride down to Westminster in the morning in term time, without feeling a conviction in his mind of their personal prowess.

John de Warrenne was another of this race of giants :—

"The only time he acted as a justice itinerant was in 44 Henry III., 1260, when he headed the commission into Somersetshire, Dorsetshire, and Devonshire.

"In the contests between the king and the barons he sided with his sovereign. He redeemed his character, however, at Evesham, where the barons were defeated. During the rest of this reign little worthy of note is recorded of him, except the *violent attack he made in Westminster Hall on Alan de Zouche and his son*, occasioned by some contest between them relative to the title to certain land, in which he killed the former and wounded the latter ; and for which he was compelled to make satisfaction, and was fined 10,000 marks, part of which he was afterwards pardoned in the next reign. He lived during thirty-two years under King Edward, and *signalised himself on various occasions against the Welsh and Scotch*, by the latter of whom, after several successful campaigns, he was eventually defeated in 25 Edward I. ; but peace between the two countries was declared the next year. Not only was he a loyal supporter of his sove-

reign's rights, but a bold assertor of his own. When he was asked by the judges, under the recent statute enacted at Gloucester, called *Quo Warranto*, by what title he held his lands, he drew his sword, and said, 'This is my warranty! My ancestors coming into this land with William the Bastard, did obtain their lands by the sword, and by it I am resolved to defend them.' (Vol. ii. p. 504.)

This reading of the statute of Gloucester was an admirable one. It is to be observed that Alan de Zouche was also a judge, and we have afterwards some account of him. It seems pretty certain, from the following account of his death, that the judges in the time of Henry III., after sitting in court all the day, had occasionally a round afterwards in Westminster Hall:—

"His death arose from a broil, touching some title to land, with John, Earl of Warren [see *antè*, p. 366.], who assaulted him and his son Roger, in Westminster Hall, and grievously wounded both. Some accounts say that Alan was slain on the spot, and others that he did not die till two years from that time. It is certain, however, that his death occurred before October 20, 1270, 54 Henry III., his son Roger doing homage on that date for the lands of his father, 'lately deceased.' " (Vol. ii. p. 528.)

In our degenerate days judges only trip each other up metaphorically, and reverse, not the bodies, but the judgments of their contemporaries. They sometimes bear each other no greater love, however, in the days of Victoria than in the time of John. We must give Mr. Foss's account of another fighting chief justiciary: in those days he seemed usually to unite the three characters of soldier, judge, and priest:—

"Immediately after the coronation of Richard I., he (Walter Hubert) was elected to the see of Salisbury, and was consecrated on October 22, 1189. In the following year he accompanied that monarch on the crusade; and, with Archbishop Baldwin and his uncle, Ranulph de Glanville, was placed in command of the forces before Acre. He alone of the three survived the campaign, and by his spirit of wisdom, was of the greatest service to the army during Richard's illness; being mainly instrumental in procuring the truce with Saladin, when the King of France had deserted the

cause. Before his return to England, he had the satisfaction of visiting Jerusalem.

"The king was so deeply impressed with his talents and prudent counsels, that when he heard of the sudden death of Josceline Archbishop of Canterbury, he took every means, even before his own release from prison, to procure Hubert's appointment to the vacant primacy. His election having taken place on the 30th of May, 1193, the new archbishop showed his gratitude by the energy he exerted in collecting the ransom for the release of his sovereign. In September, 1193, he was raised to the office of Chief Justiciary, in the place of Walter de Constantiis, Archbishop of Rouen, who proceeded, with Queen Eleanor, to the place of Richard's confinement; and his power was afterwards greatly increased by his being appointed legate of the apostolic see.

"On Richard's return he was high in his confidence, officiated at his second coronation, in April, 1194, and continued for four years to perform the duties of his office with firmness and moderation. By his advice weights and measures were regulated, and other laws against fraud were ordained. The possessor of power, however, is certain to have enemies; and he must be fortunate indeed who, in its exercise, commits no act which is obnoxious to censure. The archbishop was charged with neglecting his ecclesiastical duties, and with having violated the right of sanctuary in directing the execution of William Fitz-Osbert, a factious demagogue (I am afraid a lawyer), who had taken refuge in the church of St. Mary-le-Bow. These and other representations to his disadvantage were urged upon Pope Innocent by the monks of Canterbury, who, however, are stated by Roger de Wendover to have been instigated by the fear lest a magnificent church which the archbishop was erecting at Lambeth should occasion the removal of the archiepiscopal seat from their city. Nevertheless, their application was successful; the new church was ordered to be demolished, and the king, under the threat of an interdict, was compelled to part with his chief justiciary on the shallow pretence that it was not lawful for bishops to be engaged in secular affairs. Hubert's resignation was reluctantly accepted in July, 1198, 9 Richard I., and Geoffrey Fitz-Peter was appointed his successor." (Vol. ii. pp. 123—125.)

We shall close our notices of these judges by a short reference to the familiar name Hubert de Burgh, of whom a pleasing account is given. It is quite clear that Shak-

speare did not know that he had ever been a judge when he makes King John describe him as

“ A fellow by the hand of nature mark'd,  
Quoted and sign'd to do a deed of shame.”

Act iv. sc. 2.

And Bigot, Earl of Suffolk, address him thus :

“ Out, dunghill ! dar'st thou brave a nobleman ? ”

Act iv. sc. 3.

Hubert was of noble, if not of royal descent, was distinguished throughout his life by the important offices which he held, was a soldier as well as a lawyer, and created Earl of Kent and chief justiciary. The following anecdote respecting him is interesting : —

“ Whatever failings marked the character of Hubert, it cannot be doubted that he was a faithful servant and a wise counsellor to the monarchs whom he served. The distractions of the kingdom after he had ceased to be Henry's minister speak loudly of his power of guiding and controlling the passions of a foolish and capricious prince. No better summary of his worth can be pronounced than that of the Essex blacksmith — ‘ Do what you please with me : I would rather die than put fetters on him. Is he not the faithful and magnanimous Hubert, who hath so often snatched England from the ravages of foreigners, and restored England to England ? Who served his sovereign King John so firmly and faithfully in Gascony, Normandy, and elsewhere, so that he was sometimes compelled to eat horseflesh, his very enemies admiring his constancy ? Who preserved Dover, the key of England, against the King of France and all his power ? Who secured our safety by subduing our enemies at sea ? What shall I say to his great exploits at Lincoln and at Bedford ? May God be judge between him and you for such unjust and inhuman treatment ; repaying him evil for good, even the vilest for the best.’ ” (Vol. ii. pp. 283, 284.)

There are some other points to which Mr. Foss will enable us to allude. He gives the following account of Westminster Hall, which we extract as a good specimen of his style : —

“ The most remarkable event in the annals of law which occurred in this reign (William II.), was the erection of the great hall at Westminster. This magnificent edifice has survived the palace of



which it then formed a part, and, to whatever use it may in future be applied, must ever be especially venerated as the arena of judicial contests, the cradle of our legal worthies, and the honoured spot which has given to the law itself 'a local habitation and a name.' The associations which arise at the mention of 'Westminster Hall' are not linked so much with the parliaments that have assembled in it, or the solemn festivals which it has witnessed, as with the high legal purposes to which it has for centuries been devoted; recalling to the mind the glorious succession of venerable men who have administered justice within its walls, and of eminent advocates who have made its roof resound with their eloquence. Connected as it is with every judicial reminiscence, hallowed as it must be in the minds of those devoted to legal studies, it is not surprising that the recent attempts in parliament to remove the Courts to another locality, and apply the ancient building to different objects, should have been looked on by many as a species of sacrilege and profanation of the *religio loci*. These feelings of reverence, however, may be indulged beyond reasonable bounds; and, while the ties of association are not to be harshly or inconsiderately broken, they ought not to be allowed to interrupt the progress of improvement, nor to prevent those changes which may be called for by the necessities of the times and the convenience of the public.

"When the persons most interested in the question — the practitioners and the suitors — *are all but unanimous in their demand* for the removal, it is time to listen to their complaints, and to consider whether the sentiment which gives a sort of sacredness to the spot is an equivalent for the benefit which it is believed would be derived from the change. It has been alleged that a more central position is rendered indispensable in order to meet the alteration of circumstances, the increase of litigation, and the additional number of Courts and of Judges. *The question has not yet had a full discussion*, nor will it fairly be debated till other than legal members of the legislature apply their minds to its consideration." (Vol. i. pp. 51, 52.)

In every word of his eulogium on Westminster Hall we agree with Mr. Foss, but we take the liberty of differing from him on several points respecting the removal of the Courts. If the question has not yet had a full discussion, it is not wise either in the suitors or practitioners to be all but unanimous in wishing for their removal to a more central position. But

we do not think they *are* unanimous. We have shown on a former occasion<sup>1</sup> that the profession has expressed no such opinion, but is either silent or hostile. It is true that a portion of the Chancery Bar presented very recently a petition to the Lord Chancellor praying for the removal, which they abandoned the moment it came to be acted on. Lord Cottenham, it is true, like the gods of old, granted but half the boon, and dispersed the rest in air. Altogether, in this case, sentiment outweighs convenience.

We add one or two notices as to the Inns of Court and legal education.

“ That schools were established in London for instruction in the laws of the kingdom before 19 Henry III., appears from a strict mandate then issued by King Henry to the mayor and sheriffs of that city prohibiting their continuance.<sup>2</sup> There is nothing that seems to warrant the suggestion which has been made, that the king's object in suppressing them was to encourage the establishment of Inns of Court in the suburbs; although it might probably lead to it, but it more likely arose from a political motive, and a wish to discourage the study. The palace, now called Lincoln's Inn, was built in the early part of his reign by the chancellor, Ralph de Neville, Bishop of Chichester, and was appropriated by him for the town residence of his successors in that see. The place in which it is situate was first called New Street, but afterwards, from him, Chancellor's Lane, now converted into Chancery Lane. The name of the bishopric is still preserved in that part of the estate called Chichester Bents, which perhaps formed part of 'the garden which was John Herleycum's in vico novo ante novum Templum,' granted to the bishop on May 2. 1226, 10 Henry III.<sup>3</sup> by his royal master.” (Vol. ij. p. 201.)

Some of the walls of the “school of law” remain, but where are the teachers? The old Hall has been superseded by a beautiful new one, and the rulers and scholars are well attended to so far as the replenishment of the body is concerned. But what mental aliment is supplied by the Benchers? We hear indeed that they are so dissatisfied with the success that has attended the establishment of

<sup>1</sup> 3 L. R. 305.

<sup>2</sup> Coke's Second Inst. Proeme.

<sup>3</sup> Rot. Claus. i. 107.

lectures, that not one step further will they go. But did any one ever say that lectures *alone* would succeed? Unless accompanied by examinations, unless in some measure incorporated in the educational course prescribed and rendered necessary by the Inns of Court, no reasonable being ever supposed that lectures would avail except to a very few whose minds were previously prepared. Ask any experienced or successful lecturer how he has been enabled to interest his class and to transmit his own information into their minds, and he will say that he owed his success not so much to what he did himself, but to what his class did. It is quite true he must possess the knowledge, and the more able he is to deliver it, the better will it be for his hearers. The best lecture, however, once delivered, will rarely make more than a temporary impression; but get the student to turn lecturer in his turn; examine him, call for essays on his part, work with him on the subject, and above all hold out to him a distinct reward or honour, or profit of future advancement, to arise from his labours in the class, and then it is that the advantages of the lecture system will appear; and of this there is ample proof at our Universities, at Heyleybury, and, if we must cite a case almost on all fours, at the Law Institution. The Benchers first commence the system of lectures on a footing in which success without a miracle is impossible, and then make its alleged failure an excuse for not setting the matter right. Our opinion in favour of a system of legal education is unchanged, and if the Benchers will not give it a fair trial, we hope that means may be found for testing its advantages by some other body. Why does not the Society for the Amendment of the Law establish a law-school and throw it open to all who choose to come? for that is the only sound principle.

Mr. Foss throws some light on a matter which has puzzled all legal historians, — the apparent sale of the Great Seal in the time of Henry I.

“ In the Great Roll of 31 Henry I., of which a description has been already given, is an entry, from which Madox understands, and Lord Campbell asserts, that Geoffrey (afterwards Bishop of Durham) purchased the office of chancellor for the sum of 300*l.* 13*s.* 4*d.* It is evident that Madox was not aware how long

he had held the office at the date of that Roll, as he speaks of this sum as a 'fine *then lately made*.' What effect, therefore, the fact of Geoffrey having possessed the seal for seven or eight previous years might have had upon his opinion, can only be matter of surmise. The words are, 'Et idem cancellarius debet m. m. m. et v. j. i. et xiii s. et iii. j. d. pro Sigillo.' In them, it will be observed, there is nothing about a purchase or a fine; they simply state a debt due from him to the king, for or on account of the seal, without saying when or how it was incurred, or whether it is a whole sum or the balance of a larger amount. Although it is not altogether improbable that Henry may have received some fine for the grant of the Chancery (of which, however, there is no other evidence than this entry affords), it may be worth while, before the record is accepted as positive proof of the fact, to consider whether it is sufficient in itself for that purpose, and how far probabilities operate upon the question. As all the great rolls previous to this have been long destroyed, the only argument that can be raised upon its contents must be founded on the presumption that the same system then prevailed which is apparent in the subsequent rolls that are extant. Now in these rolls, which contain the accounts of the various crown debtors, the common course is this:—A. B. renders an account, 'reddit compotum,' of what he owes as sheriff, custos, farmer, &c. for this amercement, or for that rent or fine, &c. He pays so much by writs from the king, and so much into the treasury; and if his whole receipt is thus exhausted, the entry is 'et quietus est;' but if any balance remains unpaid, then it is 'et debet' so much; and this debet is carried over to the roll of the following year. It may be inferred, therefore, that this debt of 3006*l.* 13*s.* 4*d.*, so declared due from Geoffrey the chancellor, is the balance of a larger sum of which he had rendered an account in a former year; and this becomes still more likely when its fractional amount is considered.

"The very circumstance of its being a fractional amount makes it less probable that it was the precise fine he had agreed to pay (if he did, in truth, agree to pay anything) for receiving the Great Seal; and if it was only part of a larger sum, the improbability becomes still greater, when it is recollected that money was then at least fifteen times more valuable than it is now, and that even the balance specified would be worth in present currency about 45,000*l.* The probability, however, is almost entirely destroyed by the fact that Geoffrey was placed in the office in the early part of 1124, nearly eight years before the close of this roll; for it

never can be supposed that the king, selling the office at such a rate, even without an immediate necessity for the money, would forego the possession of the tempting prize, and permit it to continue in arrear for so long a period. The only supposition that would give it an appearance of truth would be that, after Geoffrey had held the seals for some years, the king had threatened, without such an advance, to take them away and give them to some other candidate: but of this there is no evidence whatever.

"It is observable that no one historian mentions the fact, which is one not likely to have been omitted if it had any foundation. It seems necessary, therefore, to seek for some more reasonable explanation of the entry than that which is open to so much objection. From the ignorance that must prevail of the precise duties of the chancellor at this period, and of what sums of money passed through his hands on the king's account, it is difficult to do this with any satisfaction; but it is apparent, from the same roll, that (whether as chancellor, or independently of the office, does not appear) that he was the custos of the bishoprics of Coventry and Hereford, and of the abbey of Chertsey, during their respective vacancies; and also of various manors and lands belonging to the king. It is true that he accounts for the sums received by him in respect of these during the year in question; but it may easily be supposed that he had been allowed in previous years to retain part of his various receipts, until by accumulating balances they had arrived at the amount specified. It seems as probable that the words '*pro sigillo*' might mean what he had received for the king on account of holding the seal, as that they should be interpreted into a fine for the possession of the seal itself." (Vol. i. pp. 82—84.)

Mr. Foss thus explains the custody of the Great Seal by Queen Eleanor:—

"In the next month (June 1231) the king having on his going into Gascony confided the government of the kingdom during his absence to Queen Eleanor, commanded her to deliver to William de Kilkenny the seal of the Exchequer, to be borne and kept by him *in the place of the Great Seal*, which he had directed to be locked up till his return from abroad. This order had been given by another document, whereby he had placed the Great Seal in the custody of the Queen, under his own private seal and the seals of his brother Richard, Earl of Cornwall, and others of his council. Upon this foundation a noble author, by his gallantry, and a

natural desire to vary his narrative and grace his entertaining pages, has been induced to insert Queen Eleanor as a lady keeper of the Seal. A grave contradiction to what is only, perhaps, intended as a lively sally, would be out of place; for his lordship must be well aware that, being regent of the kingdom while her royal husband was away, she could no more be keeper of the Seal during his absence, than he himself could be his own chancellor if he were present; and that the pleas he refers to in the *Curia Regis* were not held before her Majesty as *Custos Sigilli*, but as *Custos Regni*, in the same manner as the king himself sometimes presided." (Vol. ii. pp. 142, 148.)

The state of the administration of the law at the end of the reign of Henry II. is thus noticed:—

"A great change is observable in the construction of the *Curia Regis* in the latter years of the reign. It was no longer confined to the barons of the realm and the officers of the palace; but upon the records that have come down to us, the names of other persons appear as being present and taking part in the proceedings. The adoption at the Conquest of the laws of Normandy had rendered necessary the assistance of advocates from that country. The gradual combination of these with the English laws, and now the application of the Roman law, many of the forms of which had been introduced into this island, had so materially increased the complexity of the study, that it could only be pursued as a separate profession; requiring not merely that the advocates should be persons of learning and ability, but also that the judges should be masters of the science, and be selected from the most eminent among them. The persons who principally devoted their time to the attainment were naturally the clergy; and it consequently seems to have been the custom in this reign, either to raise the officers of the Court, who were usually ecclesiastics, to preferments in the church; or to appoint certain of the dignified clergy to perform the judicial duties. The prevalence of both practices will be apparent in the following list of chancellors and justiciars; among whom, without noticing their intervening steps in the church, will be found five archbishops, viz.:—Beckett, and Hubert Walter, of Canterbury; Geoffrey Plantagenet of York; John Cumin, of Dublin; and Walter de Constantiis, of Rouen: eight bishops, viz., Richard Fitz-Nigel, of London; Richard Tocliffe, and Godfrey de Luci, of Winchester; Nigel, and Geoffrey Ridel, of Ely; John, of Oxford, of Norwich; Sefred, of Chichester; and Guy Rufus, of Bangor: three abbots,

- viz., Clarembald, of St. Augustine's, Canterbury; Aymer or
- Daniel, of Chertsey; and Samson de Totington, of St. Edmund's; eight archdeacons, viz., Robert de Inglesham, of Gloucester; Josceline, of Chichester; Walter Map, of Oxford; Hugh Murdac, of Cleveland; Ralph, of Colchester; Ralph, of Hereford; Nicholas de Sigillo, of Huntingdon; and William, of Totness: besides Ralph de Warneville, treasurer of York; Wimer, and Reginald de Wisebec, two of the king's chaplains; and Master Thomas de Husseburn, a canon of St. Paul's.

"Henry is said to have attended personally at the judgment of all greater causes in his Court, and to have made frequent progresses to discover and remedy the abuses in the rural jurisdictions. His anxiety on this subject is particularly exemplified in the commissions he issued in 1170 for the investigation of charges brought against the sheriffs and his other officers." (Vol. i. pp. 160, 161.)

We should say that Mr. Foss follows throughout on the track of Lord Campbell, with no small eagerness, as it appears to us, to convict his lordship of inaccuracy. But we must say that the perusal of the work of Mr. Foss has tended very much to raise our opinion of the noble and learned lord's book in two important particulars. First, Lord Campbell, out of the same or nearly the same materials, has produced a readable and amusing book, and Mr. Foss has failed to do so; and secondly, Mr. Foss, with full leisure and sufficient learning and no lack of will, in his attempts to prove his predecessor inaccurate, has satisfied us of his general accuracy. We have shown no undue partiality to Lord Campbell as an author; we have not hesitated to point out his errors when we found them; and this was due both to ourselves and to him: but the two works tend to prove that to establish an extensive reputation, something more is wanted than hunting up records and wiping the dust off parchments, useful as these duties are, and that to give a life-like look to the dead, a knowledge of mankind and the having taken an active part in public affairs and great questions, have also their use.

Lord Campbell has, however, sometimes laid himself open to a palpable hit. Thus, speaking of an early judicial hero whom Lord Campbell claims as chancellor, he says (Vol. i.

43.): —

"Of his success we know little but the name, there being no description added to it to tell us from what country he sprang or what other office he ever filled; but a charter granted at this time by the Conqueror to the monks of St. Florentine of Andover, is witnessed and authenticated by BALDRICK as king's chancellor."

So far in the text; but Lord Campbell, we presume, to relieve its tediousness, adds one of those notes which tend so much to amuse his readers, as follows:—

"*It is said* that the poetical name for a belt or girdle was taken from this chancellor, who *is supposed* to have worn one of *uncommon magnificence*.

'Athwart his breast a BALDRICK brave he ware,  
That shined, like twinkling stars, with stones most precious rare.'

SPENSER.

'A radiant BALDRICK, o'er his shoulders tied,  
Sustain'd the sword that glistened at his side.'

POPE."

Mr. Foss maliciously disposes of most of this in the following manner:—

"Galdric, not Baldric, as Dugdale calls him, was chancellor after Bloet's elevation to the episcopal church. An undated charter, to which his name is attached as a witness, gives the church of Andover to the abbey of St. Florentine, is quoted by Dugdale as proving that he was chancellor to William I.; but the simple fact that Bloet, as Bishop of Lincoln, is the first witness to it, is sufficient evidence that it was granted by William II."

And to this Mr. Foss adds his note:—

"Lord Campbell, i. 43., who has evidently not seen the charter, from his calling it one 'to the monks of the Florentines of Andover,' adopts Dugdale's name of Baldric. *It is therefore with much reluctance* that I feel compelled to substitute that of Galdric, the more especially as the fanciful etymology on which his lordship has ventured is thus annihilated, and the poetical quotations from *Johnson's Dictionary*, which he has introduced as proofs of it, are rendered no longer applicable." (Vol. i. p. 55.)

The wiper as to *Johnson's Dictionary* displays all the venom of the antiquary. But giving Mr. Foss all credit for this and similar proofs of his care and industry, it is surprising how seldom he displaces any portion of his predecessor's work of the least importance.

Entertaining an unfavourable opinion of the design of Mr. Foss, and having felt bound to express it, we have en-



deavoured at the same time to present as agreeable a view of its contents as possible; and we say, with all sincerity, that if we cannot encourage Mr. Foss to pursue his original plan, we hope we shall meet with him again in some other way.

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## ART. IX. — THE PROVINCE OF THE BAR IN ENGLAND.

### No. II.

WE resume this subject for the purpose of showing, by reference to authorities and the ancient and recognised principles connected with the administration of the law in this country, the legitimate *status* of the Bar as an order of practitioners invested with those functions and privileges which have already been ascribed to them.<sup>1</sup>

In doing this we entirely disclaim the most remote wish to give offence to any portion of the legal profession. We desire only to discuss the subject of professional regulations as we find them. If any alteration in the present division of the duties of the profession be necessary or advisable<sup>2</sup>, it can only be made after fully understanding how all parties now stand both singly and relatively; and it is to this that we wish to draw the attention of our readers.

We have already urged that the *barrister*, in this country, is the recognised professor and expounder of the law of the land, who by ancient and recognised usage is entitled to be heard as an advocate in our courts, or in any branch of the practice of the law where legal knowledge is required; that the creation of another class of practitioners of the law is an

<sup>1</sup> See No. I., *antè*, p. 101.

<sup>2</sup> We have already received certain communications on this subject, which we hope in due time to lay before our readers. It is unnecessary for us to observe that this work does not attempt to represent any branch or section of the profession. It is the interest of the public to secure the services of learned, able, and honest lawyers, to do for them what they cannot do so well for themselves. It is only by full *INQUIRY* that we can ascertain how the exertions of such a class can be best secured. — ED.

obvious innovation, and we have also pointed out that attornies and solicitors, who from being *mere officers* of the Courts have become general practitioners of the law, have in the course of their transition imperceptibly encroached on the legitimate province of the Bar, who cannot at the present day be charged with inefficiency as a body, and on that account ought not to be excluded from the privilege conceded to every other class in the state, that *cuique in sua arte credendum est*.

The notion of *compensation* is obviously a most untenable one *per se*, and wholly beside the question at issue. Serious and gloomy, indeed, would be the prospects of the Bar as a body of professors and practitioners of the law, if *the class* were to be gradually deprived of their legitimate position, and compensation afforded to some *individuals* belonging to it—if even the very *élite* of the Bar at Westminster Hall were to be simultaneously compensated for what belongs to *the order*. It needs no prophet to discover that as a body of law professors they would soon cease to exist. Questions, however, as to the number of new offices which have been created, or fresh advantages conferred on members of the Bar, or old offices given to them which were formerly conferred on attornies and solicitors, are, after all, of little moment to the great majority of the Bar or the attornies. It is, no doubt, a matter of some consequence to the seeker after office in either branch of the profession, whether the list which is open to him is increased or diminished; but most fortunately for the general prosperity of both branches of the profession, mere offices can be the lot of a very few. Would that we could say that it did not usually fall to such as are in the enjoyment of personal or family influence—to the relations of great men already in office, or on the Bench, or in Parliament; would that we could say that the members of the profession in either branch had not been increased by persons actuated by such considerations only—that every new species of patronage, from a commissionership to a railway bill, had not summoned fresh candidates who assume the profession of the law as a mere trap to catch the loaves and fishes of patronage.

The institution of the Bar in this country, it has been already observed<sup>1</sup>, is for the most part based on no positive law. Except in criminal cases, the right of substituting professional for personal advocacy, in England as in all other civilised countries, has never been deemed to require the sanction of the legislature. Express statutes, indeed, were deemed necessary, even in civil actions, in order to enable the suitor to appoint an agent to *appear in his stead* to the original summons or citation<sup>2</sup>, and the right to professional assistance in criminal cases was only fully conceded within these few years; but the existence of an independent order of men expressly devoted to the study and practice of the Common Law, whose services were, with these restrictions, at the disposal of the litigant or the suitor, can be traced back to the sources of the Common Law itself; and the origin of the institutions associated with that order appears to be lost in remote antiquity—in comparison with which the dates of the foundation of the Inns of Court (our juridical universities) appear to belong to a modern era; for our legal antiquarians give all these dates long subsequent to the statute of Merton, whereby parties were allowed to appear by attorney.

This question of the immemorial existence of an independent order of advocates and professors of the Common Law, is not merely of antiquarian interest. It obviously involves in it the title to those personal privileges which the barrister of the present day lays claim to, and that position in the state which the Bar as a body have so long held.

Without entering at any very great length into the evidences on which the prescriptive rights of the Bar rest, it may suffice to refer to the fact that professors of the Common Law, under the term of *countors, narratores, sages gents*, &c., occur in our earliest records, in order to surmise—what must be obvious—that the profession of the law could at no period of our history have been adopted without a settled and recognised qualification, which it rested with the order, as in the case of the church, the physicians, the guilds or fraternities of traders, &c.,

*Antè*, p. 89.

<sup>1</sup> 20 Hen. 3. c. 10.; 3 Edw. 1. c. 42. &c.

themselves to impose; and that the regular universities, corporations, and societies, into which these various orders subsequently merged, merely carried on under more settled rules that system of conferring degrees which they ages before practised.

The higher order of common lawyers, we know, were during many ages, in accordance with the feudal institutions of Normandy, generally called by writ to the service of the crown, and we find therefore this higher class of pleaders at one period almost uniformly designated by the name of *servientes ad legem*. This circumstance, however, obviously affords no proof that serjeants-at-law were at any period the *only* pleaders or advocates known to the law of England, nor does it in fact appear to prove more than this,—that in accordance with the genius of the feudal institutions, the practice of the law in the royal courts was at one period deemed a service, and that the serjeants selected by the crown from the general body of pleaders became members, as the attornies admitted by the judges from the inferior class became officers of the Court of Common Pleas at Westminster.

The *countors* or *banci narratores*, mentioned by Matthew Paris as the pleaders recognised by the Common Law, do not seem in any way to have been engaged in the royal service, or entitled on that account to the designation of *Serjeants*.<sup>1</sup> Indeed, the *coif* itself appears to owe its origin to a circumstance incompatible with the fact of its wearer being in the service of the crown; and whatever veneration may be yet entertained for that peculiar badge of legal rank, it must never be forgotten that its wearers were at no period the *only* professors of the Common Law of England.

Matthew Paris, whose authority is relied on for the fact of

<sup>1</sup> Mr. Serjeant Manning, a great enthusiast in the question of the antiquity of the degree of *Serjeants-at-law*, observes, "The fees payable by the 'Counter' appear to have induced the Conqueror, or some of his more immediate successors, to treat the office as a serjeanty in gross, and to assume, if they did not possess it before, the right of appointing to this serjeanty." (*Preface*, p. ix.) "Originally all serjeants-at-law appear to have been *servientes regis ad legem*." (*Id ib.* note (*l*).) See also 2 Inst 422. to the same purport; and Co. Litt. 106 a., as to the tenure of the office of serjeant-at-law.

the order of pleaders (the *conteurs et sages gentz*) already alluded to being distinct and independent of the *serjeants*, fixes the date of the story of William *de Bussy*, who wearing the coif claimed the benefit of his orders or clergy, as A. D. 1259, or 43 Henry 3. From this it clearly appears that he was not a *serjeant* in the modern sense of that term, and we know that the very next reign witnessed the foundation of the Inns of Court expressly devoted to an order of advocates from whom the *serjeants* were selected, but from whom, on being promoted, they immediately retired to another inn, expressly set apart for them.

In this reign of Edward I. the term *apprentice* appears; and in a statute where they are mentioned, the king's justices are directed to admit to the office of attornies certain of the apprentices of the Bar; and we thus find a new forensic degree, apparently before unknown, as we do afterwards in that of *utter barrister* and *inner barrister*, and, many ages subsequently, in that of *Queen's Counsel*: but whatever degrees the crown, or the Bar themselves may in their universities create, it is certain that these degrees could only be conferred on a member of the independent order of the Bar, to which order the crown had at no period the power of compelling admission; and with what advantages to the public this independent and exclusive privilege has been enjoyed may be gathered from the fact that in no recorded case of the exclusion of a candidate for admission into, or his expulsion from the order, has the charge of sinister motives for the decision been imputed.

The Inns of Court, the legitimate representatives at the present day of the order of barristers recognised by the Common Law, do practically admit, as a student, any one of good character to graduate for the Bar, and after the requisite course of probation has been gone through, call him to the degree of barrister; so that whatever defects there may be in the modern system of education prescribed by the rules of these societies, and however capable of improvement in other respects those rules are, little objection can be made to them on the ground of exclusiveness or of expense.

The Inns of Court have been termed by Lord Mansfield "Voluntary societies, which for ages have submitted to go-

vernment analogous to that of other seminaries of learning.”<sup>1</sup> Lord Tenterden, commenting on this, observes that “the very term *voluntary society* imports in it a discretion in the individuals composing it to admit or reject members as they please. It is true that the twelve judges are the visitors of the Inns of Court, but in that character they have jurisdiction only over actually admitted members.” He further observes that Lord Mansfield must be understood to have meant that they submit to such rules and regulations as they themselves ordained for the internal government of the society, but not that they submit to any foreign jurisdiction as to the persons whom they are to admit as members<sup>2</sup>; and in this the other judges<sup>3</sup> seemed to concur, Mr. Justice Bayley saying it was analogous to the case of a college in which no individual has an inchoate right to be admitted.

The decision in this case accords with the received opinion that the Inns of Court have not the incidents of ordinary corporations. Either in consequence of charters of incorporation or of direct grants from the crown of the possessions which they at present hold<sup>4</sup>, by whatever title however they

<sup>1</sup> *Rex v. Gray's Inn*, 1 Dougl. 354.

<sup>2</sup> *Rex v. Benchers of Lincoln's Inn*, 4 B. & C. 855., 7 D. & R. 351.

<sup>3</sup> Bayley, Holroyd, and Littledale.

<sup>4</sup> If the crown grants lands to a vill, they have thereby a corporate capacity to take if a rent be reserved. 1 Rol. 513. l. 40. And hence the old order of Templars were said to be incorporated. 10 Co. 33. The benchers and ancients of the Inns of Court certainly appear to have taken grants of land in a collective capacity. The following is a translation of the original grant of the Temple by James I. A. R. 6., from a copy in the Rolls Chapel, and used by Serjeant Talfourd in *Mr. Hayward's case*, p. 66. : —

“To all to whom these presents may come, &c. — Whereas our kingdom of England, most flourishing in the arts of peace for so many ages, and devolved on us by the singular Providence of God in his good time by hereditary right, is indebted for a great part of its felicity to the ancient and peculiar laws of that kingdom, proved by a long series of ages to be best adapted to that warlike and populous nation : And whereas the inns of the Inner and Middle Temple, being of the number of those four most famous colleges of all Europe, frequented by students and proficients in the said laws, have been, for a long time, by the gratuitous munificence of our progenitors kings of England, dedicated to the use of the students and professors of the said laws ; to which Inns, as the best seminaries of learning and morals, very many youths, excelling in lustre of descent as well as in the endowments of mind and body, have continually resorted from all parts of this realm ; and from which many, as well in our times as in those of our predecessors, have been taken by reason of their exalted me

originally derived their important privileges, it is probable they would be held to be included in the various statutes for the general confirmation of liberties and franchises<sup>1</sup>; and in one case we find the constitution of the Inns of Court as voluntary societies subject to appeal, pleaded to the jurisdiction of the Court of Chancery and the plea allowed.<sup>2</sup>

The Court of Queen's Bench has hitherto invariably refused to interfere by way of mandamus with the discretion of the benchers as to calling to the bar or the admission or expulsion of members<sup>3</sup>; and in almost every case where it has been thought advisable to appeal from the decision of the benchers to the judges as visitors, the decision of the benchers has been confirmed.<sup>4</sup> It must not be imagined, however, that either the Inns of Court in their collective capacity, or the individual members as barristers or legal

rits, to discharge arduous offices of state and justice, in which they gave great examples of prudence and integrity, to the honour of the said profession and the ornament of this realm, and the good of the whole state: Know, therefore, that we desiring, so far as in us lies, to perpetuate the happy state of this kingdom, flourishing for so many ages through the administration of the said laws, and compassing not so much the continuation of the former celebrity of the said Inns as an accession of new splendour, and in order that we may have our benevolence and munificence towards the profession and professors of the said laws confirmed to all posterity, of our special favour and mere motion we have given and granted, and by these presents do give and grant, for ourselves, our heirs and successors, to our well-beloved and faithful counsellor, Julius Cæsar, alias Adelmæ, Knt., Chancellor and Under Treasurer of our Exchequer; Henry Montague, Knt., Recorder of our City of London, and one of our counsel in the law, &c., the said inns and capital messuages, with the appurtenances, called or known by the names of the Inner and Middle Temple, London; and all halls, cloisters, chambers, gardens, &c.; which inns, messuages, &c. we will, and by these presents for ourselves and our successors, order to be applied for the lodging and education of the students and professors of the said laws sojourning for all time to come in the said inns."

<sup>1</sup> 9 Hen. 3. c. .; 1 Ed. 3. c. 9.; 14 Ed. 3. c. 1.; 1 H. 4. c. 1.; 7 H. 4. c. 1.; 9 H. 4. c. 1.; 13 H. 4. c. 1.; 3 H. 5. s. 2. c. 1.; 2 H. 6. c. 1.

<sup>2</sup> *Cunningham v. Wood*, 2 Bro. Ch. Ca. 24.

<sup>3</sup> *Townsend's case*, T. Raym. 69., 2 Show. 178.; *Rex v. Gray's Inn*, 1 Dougl. 353; *Rex v. Lincoln's Inn*, 7 D. & R. 351; S. C. 4 B. & C. 855.

<sup>4</sup> *Rex v. Gray's Inn*, 1 Dougl. 353. *Re H. H. Pyke*.

In the recent much-controverted case of *Mr. Hayward, Q. C.*, relating to the mode of electing Benchers in the Inner Temple, the Judges held that they had no legal power to interfere, but recommended, in their character of visitors, a different mode of election for the future.

practitioners, are free from the control of her Majesty's Courts at Westminster.

There are records of a series of ordinances made by the Chancellor and Judges for their government and regulation with regard to the admission of members, keeping commons, calling to the Bar, &c.<sup>1</sup> Whether, however, these ordinances are in force at this day may perhaps be open to argument; considering, on the one hand, the unsettled notions of the extent of the royal prerogative at the time when they were passed, and on the other, the Act of Henry VII., as to ordinances made by masters, wardens, and fellowships of crafts, which might perhaps be construed to extend to the ordinances of the masters of the Bench of the Inns of Court.<sup>2</sup>

The Benchers of the Inns of Court, with an honourable anxiety to avoid shielding themselves under the designation of mere voluntary associations, some years ago adopted a resolution<sup>3</sup> that "the Judges are requested to entertain the application of any gentleman who may be refused admission into this Society; this Society being willing to be bound by the decision of the Judges upon such application;" and to avoid the influence of mere caprice in the admission or rejection of members, each Inn of Court has fixed regulations on the subject, and indeed some of these have been sanctioned by the concurrence of the whole of the four Inns, *e. g.*, that

<sup>1</sup> See Dugdale's *Origines Jur.*, 141. 147. 191. 193. 274-5. 311—327. See *Orders of the Lord Chancellor and the Judges*, 16 Car. 2., reporting the orders 12 Jac. and 6 Car. 1. Pearce, 426.

<sup>2</sup> No masters, wardens, and fellowships of crafts shall make any acts or ordinances in diminution of the profit of her Majesty, or against the common profit of the people, unless examined and approved by the Chancellor or Chief Justices of either Bench, on pain of forfeiting 20*l.* 19 H. 7. c. 7. s. 1.

The interposition of the Judges as Visitors of the Inns of Court, and of the Chancellor, Privy Council, &c., as to the regulations for calling to the Bar, probably gave rise to the *dictum* in *Rex v. Gray's Inn*, that all the power the Inns of Court have concerning the admission to the Bar is "*delegated to them from the Judges.*" The power of the Judges as Visitors of the Inns of Court, in revising their rules, &c. is, it is obvious, very different from that of conferring on them any original power. The term delegation is obviously an improper one, for the Judges themselves never had the power which they are said to have *delegated*.

<sup>3</sup> 24th January, 1837.



which prohibits persons from graduating for the Bar whilst pursuing some other vocation<sup>1</sup>; and of late years great efforts have been made by the Benchers of the several Inns to secure a general concurrence in the regulations introduced by them.

We have entered upon this subject of the Inns of Court in order to show that the notion of the English Bar being an independent body is not founded only on the personal conduct of its members, but also on the very constitution of the order. The theory of this constitution is, that not even the Crown, by virtue of its prerogative, can confer the privileges of a barrister on a party not belonging to the order<sup>2</sup>, and, as already urged, to this order exclusively belong those high and important functions in the administration of civil and criminal justice which are involved in the terms *advocate*, *pleader*, and *counsel in the law*. In return for the monopoly which the Bar enjoy, their professional services, learning, and talents are, in accordance with a principle existing as far back as we can trace, indiscriminately at the disposal of the litigant, be he rich or poor, powerful or abject, a personal friend or a personal enemy; and though such services are not required by our law, any more than in other countries, to be *gratuitous*, the *quiddam honorarium* with which it is usually and ought invariably to be accompanied<sup>3</sup> has been

<sup>1</sup> "No attorney-at-law, solicitor, writer to the signet, writer in the Scotch Courts, proctor, notary public, parliamentary agent, or other agent to any appellate court, or other person acting as such, and no clerk of or to any barrister, conveyancer, special pleader, attorney, solicitor, writer to the signet or writer to the Scotch Courts, proctor, notary, parliamentary agent, clerk in chancery, or other officer in any court of law or equity, whether such clerk be articulated or in the receipt of a salary or other remuneration for his services, can be allowed to keep commons in the hall of this Society, available for the purpose of being called to the Bar, until such person, being an attorney, shall have taken his name off the rolls; and until he and every other person above named and described shall have ceased to act or practise as such attorney, writer to the signet, or writer of the Scotch Courts, solicitor, proctor, notary, agent, or clerk as aforesaid." Pearce, 390.

<sup>2</sup> An instance is recorded in Duhigg's "History of the [Irish] Inns of Court," of an unsuccessful attempt on the part of the Crown to create a barrister by patent. It may be remembered a similar unsuccessful attempt on the part of the Crown is cited by Sir Edward Coke, in the instance of creating a citizen of London. 8 Co. 126. b.

<sup>3</sup> The Art. *sup.* *Chartas*, prohibiting maintenance and champerty, provides

always regulated by usage and professional etiquette, avoiding at the same time the indecorum of *bargain making* on the part of the Bar, and the imputation upon them of less worthy inducements for exertion than that of acquiring reputation and its consequent professional advantages.<sup>1</sup>

that nothing in those laws shall prevent the subject having counsel *des counseurs et sages gens par son donant*. 28 Edw. 1. c. 11.

<sup>1</sup> This may be a convenient place for printing the following Report, which has been largely circulated among the Bar. We abstain for the present from any observation respecting it : —

“ At a SPECIAL GENERAL MEETING of the MEMBERS of the INCORPORATED LAW SOCIETY, held in the Hall of the Society, Wednesday, 29th November, 1848, BENJAMIN AUSTEN, Esq., in the Chair,

“ The following Report of the Council of the Society was read : —

“ In the Annual Reports of last year and of the year preceding, the Council noticed the various communications which they had received on the doubts and difficulties consequent upon the unsettled and unsatisfactory state of the practice with respect to retainers, and which had given occasion to frequent differences, not only between Barristers and Attorneys and Solicitors, but between Attorneys and Solicitors themselves.

“ The attention of the Council was accordingly directed to this very important subject, with a view to the establishment of such rules as might in all ordinary cases enable the practitioners to regulate their proceedings on behalf of their clients.

“ In the first place, they considered it necessary to ascertain, as accurately as possible, what was the actual practice, so far as it could be collected from those members of the profession who, from long experience, were most conversant with the subject.

“ After great previous deliberation, a series of questions was prepared, and, on the 28th of January, 1847, was settled, printed, and circulated among the Attorneys and Solicitors of London, who were invited to give the required information, — to point out any inconvenience which they had experienced from the existing practice, and to suggest means for improving it.

“ The Council received numerous answers to their enquiries, which were carefully arranged and digested. In the result it appeared, 1st, that comparatively few points in the practice were clearly settled and uniformly acted upon ; 2nd, that there were others which, although well known amongst practitioners, and generally complied with, were highly objectionable and inconvenient ; and, 3rd, that there were many of so doubtful a nature that Attorneys and Solicitors differed widely upon them.

“ From the materials thus collected, and their own professional experience, the Council prepared a series of rules for the guidance of Attorneys and Solicitors in retaining Counsel ; and, with a view to obtain the concurrence of the Bar, they, on the 6th of May, 1847, submitted these proposed rules to all the Judges of the Superior Courts, to the Attorney General, the Solicitor General, the Queen's Serjeants, the Queen's Counsel, the Serjeants at Law, and the Benchers of the several Inns of Court.

## ART. IX. — ON THE RIGHTS OF PROPERTY CONNECTED WITH RAILWAYS.

### No. II.

#### *Rating of Railways.*

SOME endeavour will probably be made in the approaching session to obtain a revision of the present system of assessment upon railways for local rates, it being considered that

“In reply to this communication, the Council, as stated in their last Report, were favoured with some valuable suggestions from two gentlemen of great eminence at the Bar, which were most carefully considered, and for the most part adopted.

“No further suggestions having been received from the Bar, the Council, on the 6th of April, 1848, forwarded a printed copy of the proposed Regulations to every member of the Society, to every practising Attorney and Solicitor in London, and to all the Law Societies in the country, inviting the favour of their sentiments upon them, stating it to be the anxious wish of the Council that rules designed to regulate the practice on this important subject should be rendered as perfect as possible, and be adopted with the full concurrence and approbation of both branches of the profession.

“The Council have received several communications and suggestions from Attorneys and Solicitors in answer to their last circular, to which they have given their best attention, and have convened the present meeting of the Society for the purpose of taking into consideration the proposed rules, with a view to their adoption by the profession.

“(Signed) B. AUSTEN, *President.*

“It was moved by the President, seconded by the Vice President, and resolved unanimously,—

“I. That it is highly expedient that the present uncertain and variable usage relating to the retainers of Counsel should be reduced to certainty, by the establishment of a series of intelligible rules, whereby the interest of the suitor, and the convenience of both branches of the profession may be consulted and secured.

“II. That the rules of practice now read are fair and equitable, and calculated to promote those important objects, and that they be approved and adopted.

“III. That the Members of the Society now present engage to adhere strictly and invariably to such rules of practice in the retainer of Counsel, and that such Members do signify their adhesion by inserting their names in the book now produced for that purpose. •

“IV. That all absent Members of this Society, and Attorneys and Solicitors in general, be earnestly invited to adopt the rules, and sign the book before referred to, and that such book do lie in the office of the secretary for the purpose of receiving signatures.

they have hitherto been mulcted to an excessive amount. It has been too much the feeling of the public that railway property is fair spoil, and the expenditure on the part of some companies has given some encouragement to this evil. If it be found on inquiry that in fact the mode of rating has hitherto pressed too hardly upon railway property, it would be only right that the system should be changed. Its magnitude makes it exceedingly important, both for the railway

“ V. That in case of any difference of opinion regarding the construction of such rules, or the practical application thereof, in any case occurring between Members of the Society, the question be stated in writing, and submitted to the determination of the Council of this Society, whose decision shall be final.

“ VI. That in case of any such difference between Attorneys or Solicitors, not being Members of the Society, they be recommended to consent to refer the matter in difference either to one of the Taxing Masters of the Superior Courts of Law or Equity, or to the Council of this Society, and in all such cases to abide by the decision.

“ VII. That these resolutions, together with the report of the Council, this day made to the Society, be printed; and that copies of each of those documents, and of the rules adopted, be sent to the Judges of the Superior Courts, to the Attorney General, the Solicitor General, the Queen's Serjeants and Queen's Counsel, the Serjeants at Law, the Benchers of the several Inns of Court, to each Member of this Society, and to the metropolitan and provincial Law Societies; and that the Council be requested to take such further measures as they deem requisite to procure assents to the rules.

“ RULES OF PRACTICE relating to the RETAINERS of COUNSEL, adopted unanimously at a Special General Meeting of the Incorporated Law Society, held in their Hall, on Wednesday, the 29th day of November, 1848.

“ GENERAL RETAINERS.

“ I. That a general Retainer applies to all Courts in which the Counsel receiving it shall practise.

“ II. That if the Counsel should be offered a special Retainer by the opponent of the party having given such general Retainer, in any other Court than that in which he shall usually practise, the general Retainer entitles the party giving it, to notice before the offered Retainer is accepted.

“ III. That the general Retainer lasts for the joint lives of the Client and Counsel, or so long as the Counsel continues in practice, except it be lost, according to any of these Rules.

“ IV. In case a special Retainer or Brief is offered to Counsel against the party who has given a general Retainer, the Counsel is at liberty to accept the special Retainer or Brief of the other party, unless within one week after Issue joined, or Replication filed, a special Retainer or Brief be given by the party who gave the general Retainer.”

[The Report thus proceeds to give rules, not only relating to general, but special circuit and other retainers, with a list of fees.]

interest and for rate-payers not interested in railway property that the principle of rating such property should be settled on its proper basis. The importance of the subject demands a careful discussion, and we propose on the present occasion to show how the law now stands as to the assessment of railway property to the relief of the poor: first, how such property is to be rated during the construction of the line; and secondly, how it is to be rated after the line is completed. Before any alteration can be made in any law, it is absolutely necessary to have clear views of its existing state.

The law as to assessment during the construction of the line is settled by the Land Clauses Consolidation Act, 1845, and admits of no dispute. By s. 133., if the promoters of any undertaking become possessed of any land liable to be assessed to poor's rate, they shall, until the works shall be completed, be liable to make good the deficiency in the assessment by reason of such land being used for the works; and such deficiency shall be computed according to the rental at which such lands were rated at the time of the passing of the special act.

When the line is completed *and traffic commenced*, the company becomes liable to be assessed to the rates made for the relief of the poor in the several parishes through which the line or any of its branches are made to pass. They are liable to these rates on precisely the same principles as the occupants of other property, that is, as the owners and occupiers of the lands, stations, and buildings belonging to the railroad, and for the value of such occupation.

The law as applicable to railway property, as at present laid down by the Courts, is contained chiefly in the three following cases, namely, *Regina v. London and South Western Railway Company*<sup>1</sup>, *Regina v. Grand Junction Railway Company*<sup>2</sup>, and *Regina v. Great Western Railway Company*.<sup>3</sup>

But before considering these cases, it may be as well to show the principle on which property generally is rated. It

<sup>1</sup> Q. B. 558.

<sup>2</sup> 4 Q. B. 18.; 18 L. J., N. S., 94.; M. C. 4 Railway Ca. 1.

<sup>3</sup> 15 L. J., N. S., 80.; M. C. 4 Railway Ca. 28.

has long been settled law that, in assessing hereditaments to the poor's rate, the rate must be made on the occupation value; and whether the owner be himself the occupier of the property, or whether he let it to another person, the rate is to be imposed upon the value of the rent which a solvent tenant would pay for such occupation in order to carry on business there.<sup>1</sup> The Parochial Assessment Act (6 & 7 W. 4. c. 96. s. 1.) enacts that "no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent; provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable."

In applying this principle to the rating of railways, the difficulty has been to ascertain the occupation value. It is obvious that the value of the lands before they were taken by the railway affords no test; the expenditure of capital in forming the railway completely alters the character of the land, and greatly increases its value, as the value of any small plot of land would be increased by valuable buildings erected thereon; we are therefore not to ascertain what was the former value of the land, but what in fact a tenant would give as rent for the railway with all its rights. The demise of a railway with the stations and buildings and the advantages possessed by the company would give the lessee not only the right of taking the tolls fixed by the company, but also the ability of carrying on a lucrative trade, practically

<sup>1</sup> 43 Eliz. c. 2.; 13 & 14 Car. 2. c. 12.; *Rex v. the Trustees of the Duke of Bridgewater*, 9 B. & C. 68.; S. C. 4 M. & R. 143.

as monopolists, which would without doubt induce the lessees to give a greater rent than the value of the tolls. These tolls are not identical with the fares; they are certain charges which the railway companies are authorised by their acts to take from persons other than the company carrying on the traffic on the lines, for the user of the lines, and are less than the fares and freights for carriage; where the company are themselves the carriers, of course the tolls are included in the fares and freights.

It must be borne in mind that profits of trade are not to be rated. The railway company has a double capacity, first, of proprietors of the railway, and, secondly, of carriers upon it. In respect of their profits in their former capacity they are rateable, in respect of their profits in their latter capacity they are not. The question then is, how their profits are to be divided, how much is to be attributed to each source? The trade carried on in the railway could have no existence without the buildings and lands, and ought the profits of this trade in any and what degree to affect the rateable value of the lands and buildings? The cases of *The King v. St. Nicholas, Gloucester*<sup>1</sup>, and *The King v. Bradford*<sup>2</sup>, have established the principle on which this question is to be answered. In *The King v. St. Nicholas, Gloucester*, a steelyard, part of a machine in a street leading by a house, was in the house; sums were paid by persons for weighing their waggons and carts, but these persons were not compellable to weigh them. Without these profits the house was worth 5*l.* per year. These profits were worth about 40*l.*, and these, after due deductions, were included in the rate, as enhancing the rateable value of the house. The Court thought rightly so. Lord Mansfield considered the house and machine as one entire thing. "The principal purpose of the house," he said, "is for weighing. The steelyard is the most valuable part of the house." "If," said Willes J., "a billiard table stands in a house, and the house should in respect of such table be let at a higher sum, it is rateable, while the table continues there, and it is so

<sup>1</sup> Cald. 262.

<sup>2</sup> 4 Maule & Selwyn, 317.

let, at the advanced rent." Buller J. said, "There is an extraordinary profit arising from the modification of the enjoyment. The only question, therefore, is, whether a man shall be rated for the property he has. If a house to-day is let for 30*l.* per annum, and to-morrow, if turned into a shop, would let for 50*l.*, when it is turned into a shop it shall be rated at 50*l.*" The Court regarded neither the nature of the source of profit, nor its permanence. They looked only to the existing value of the subject-matter of the rate, the house, and rated it according to that value.

In *The King v. Bradford* a canteen was demised, and the privilege of using it as such, and selling liquors therein, at two distinct rents, in the hope of successfully contending that the rate should be on the rent of the house only. The Court, however, looked to the substance, not to the form, and held both sums to be parts of one entire rent, paid for the occupation of the house and the enjoyment of the advantages which for the time belonged to it, and for the time enhanced its value. Le Blanc J. said this was not rating the canteen man "in respect of the profits of his trade, but only of the rent which he paid." The occupation of the house was necessary for the earning the profits of the trade, and the house became more valuable on that account.

When the question of railway rating came before the Courts for consideration, the cases just quoted were adopted as showing how the profits of land which are to be included in the occupation value are to be distinguished from the profits of trade.

The leading case as to railway-rating is *Regina v. the London and South Western Railway Company*. The Company were assessed to the poor's rate in the parish of Mitcheldever in the county of Southampton, at a sum of 4320*l.*, being the proportionate part of the assumed annual occupation value of the whole line in respect of four and a half miles of the railway, the portion of the line running through that parish. This rate was disputed by the company. By s. 157. of their Act, 5 W. 4., c. 88. (local), it is enacted that "in all cases in which the said company of proprietors shall carry for their own profit any passengers, cattle or other animals, goods,



wares or merchandise, articles, moneys or things, a separate account shall be duly kept, showing the amount of rates or tolls which would have been received by the said company for the use of the said railway, in respect of such passengers, cattle or other animals, goods, wares or merchandise, articles, moneys or things, if carried by any other party or parties; and the overseers of the poor of the several parishes and townships through which the said railway shall pass shall have free access to, and liberty to inspect the same, at any time during the first fourteen days in the months of July and January in such year."

The company kept the account of tolls as directed by the 157th section of the act, which tolls for the parish of Mitcheldever amounted to 3470*l.* 13*s.* 9*d.* The company contended that the assessment should be on the sum of 1293*l.*, being the rent which a tenant from year to year would give them for the exclusive right to receive tolls for the conveyance of goods, cattle, and passengers, in the manner mentioned in section 157. of their said act, along so much of the railway as lies in the said parish, free of all usual tenant's rates and taxes, and tithe commutation, rent charge, and making all deductions for the average annual cost of repairs, insurances, and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent, being the deductions authorised by the Parochial Assessment Act. The respondent parish contended that the annual value was not to be estimated on the basis of the tolls alone, nor was to be limited to such tolls or their value; but that the advantage which a lessee of a railway may be expected to derive from his lease by supplying power and by carrying upon it, may be taken into account. That if a lessee is to be supposed capable of deriving from the use of the railway all the profits which now accrue to the company from the conveyance of passengers, cattle, and goods, under the powers of their acts, such lessee finding locomotive power, carriages, &c., and paying all expenses incidental to working the railway, then the whole railway, with its fixtures and appurtenances, might be reasonably expected to let from year to year at a rent which, for the purposes of the rate in question, might be assumed at 70,000*l.*

per annum at the least, free of all usual tenant's rates and taxes, and tithe commutation rent charge, and making allowance and deductions for the average annual cost of repairs, insurance, and other expenses necessary to maintain the way, its fixtures, and appurtenances, in a state to command such rent. The larger rate was confirmed by the Court of Quarter Sessions, and in a case submitted for the opinion of the Court of Queen's Bench, the following questions were put, namely, "Whether the company are rateable upon the principle contended for by them, or upon that contended for by the parish?" that is to say, Whether upon an estimate of the net annual value obtained from the statement of the tolls which would be received by the company as aforesaid, forming the basis of the rent which a tenant would give as before mentioned, subject to proper deductions, or upon an estimate of the net annual value, as ascertained by a rent given by a tenant under the circumstances and for the purposes above stated as contended for by the parish.

The case was argued in Hilary Term, 1842. It was held by the Court of Queen's Bench that the principle of rating adopted by the parish as above stated was correct, and that this principle applies, notwithstanding the 157th clause of the company's act requiring an estimate or account of the tolls to be kept as above mentioned, and that the company shall, under heavy penalties, allow the parish officers to have access to such estimate or account. The Parochial Assessment Act introduced no new principle of rating. Lord Denman, C. J., said "Let now the principle which these cases (the *King v. St. Nicholas, Gloucester*, and the *King v. Bradford*) establish be applied to the facts before us, if we wish to know whether the fares would have been properly included in the rate before the Assessment Act passed. We apprehend that according to that principle the only question to be asked would be, Do they increase actually the value of the buildings and lands on which the rate is to be made? If they do, and to whatever extent they do, to that extent, due allowance always being supposed, they must, directly or indirectly, be included. It would be no answer to say that by law the railway is a highway; that all the world

may carry goods and passengers on it; that it is an accident that the company monopolise all the trade, and that their monopoly may cease to-morrow. These, so far as they lessened the value of the buildings and lands, would be proper to be taken into the account as to the quantum of the rate, but that would not affect the principle. Then do the fares increase the value of the buildings and lands? No one can doubt, indeed the case has answered that they do, that a higher rent for the buildings and lands might be obtained in consequence of the facility afforded by the occupation of them to the carrying on a lucrative trade, and earning the profits on those fares. The case thus supposed would be exactly the same in principle as that of the house and engine, the house and billiard table, the house converted into a shop, the canteen." The Court thought it made no difference in principle that the railway is in more parishes than one, and that they were dealing with a parish in which there was no station-house or other appendage to the railway. "The subject matter of the rate in any particular parish is, no doubt, the beneficial occupation of land there, and you cannot draw into the rate the value of the occupation of buildings elsewhere; yet as you are to rate on the value in the parish, however occasioned, you cannot strike off any portion, because it would not have existed but for the occupation of buildings in another parish; still it exists, and in the parish, and therefore cannot escape the rate there."

The principle of rating laid down in the foregoing case of the London and South Western Railway Company was disputed by the Grand Junction Railway Company, in the case of *Regina v. the Grand Junction Railway Company*. The Court of Quarter Sessions, acting on that principle in rating the latter railway for the relief of the poor in the parish of Leighford in the county of Stafford, fixed the sum at which the company was to be rated at a greater sum than what the tolls would have amounted to. Upon this railway the company exercised the right of carrying passengers and goods, providing stations, locomotive power, carriages, &c., charging fares and freights, in addition to the tolls authorised by the acts, and making profits, as was the case on the

London and South Western Railway; but other parties also exercised the right of being carriers on this railway, providing for themselves stations, locomotive power, carriages, &c., making profits of their trade, and paying to the company the tolls fixed by them in pursuance of their acts; and a third class of carriers hired from the company locomotive engines, and the use of stations, &c., but provided their own carriages; they made profits and paid the tolls, and also a compensation for the use of the power, stations, &c., provided for them. There being this difference between the two cases, the Grand Junction Railway Company hoped, on a reconsideration of the decision in the London and South Western Railway Company's case, that the Court would be induced to limit the assessment to the amount of the tolls, after making the deductions pointed out by the Parochial Assessment Act, and appealed against the decision of the Quarter Sessions; but the Court adhered to the principle before laid down by them. Lord Denman, C. J., said, "The rate is to be on the occupier in respect of the beneficial nature of his occupation; in estimating which, as to the amount, or, to put it in other words, in ascertaining how much annual rent such an occupation may be expected to command, parish officers are to consider not drily and only what would legally pass by the demise of it, but all the existing circumstances, whether permanent or temporary, wherever situated, however arising or secured, which would reasonably influence the parties to the negotiation for the tenancy as to the amount of the rent." . . . "The profits of trade, as such, cannot be brought into the rate; but if the ability to carry on a gainful trade in land adds to the value of the land, that value cannot be excluded on the ground that it is referable to the trade. Suppose a house occupied by a private family to-day, which, having greater advantages of situation for the purpose of trade, should be turned into a shop to-morrow, and, in consequence, it lets for double or treble the former rent, would not the rate be properly increased in proportion? Could it be objected, that to do so, is to rate the profits of trade?" . . . "There is a fallacy in confounding that to which the lease conveys the

legal title with that which it gives the lessee the means of doing or obtaining; no two things can be more distinguishable, and it is the latter which regulates the rent the tenant will give, and not the former. Suppose two estates of equal size, and in all respects of equal fertility, but one surrounded by excellent roads, or with a canal near to it, and a large market, and the other without these advantages: of course the rent and rateable value of the one would be larger than that of the other; yet, as the tenant would take no more by the lease of the one than he would by the lease of the other, the lease would give him no legal title which he had not before to use the roads, or the canal, and the market. Or, suppose a more peculiar case: *A.*, the owner and occupier of Blackacre, and having the command of a stream of water which he can turn over Whiteacre, and on that account he desires to rent it; to him it will be more valuable than to any other occupier, because he fertilises at little expense; he will, therefore, give a larger rent than any other person, yet, by the lease, he would take no more than any other person, although he ought, undoubtedly, to pay a higher rate. Apply the principle of this case to the railway of the appellants, and it is quite true, that, if they were to let it to a tenant, the lease would convey the land and railway only, and give a title to the tolls only; but the lessee would undoubtedly consider the facilities and advantages which the occupation as tenant would afford him for carrying on a lucrative trade as a carrier; and in whatever proportion that consideration would increase his rent, in the same, after due allowance, would his rate be raised also. The two propositions are equally true, that the rate is not to be imposed in respect of the profits of trade, and that it is to be imposed in respect of the value of the occupation."

In the case of the Grand Junction Railway Company, in addition to the principle of rating, the Court had to decide what deductions should be made from the gross receipts, as including whatever is referable to trade, as distinguished from the increased value which that trade gives to the land. The gross receipts of the company for the whole railway were ascertained at the sum of 440,366*l.* The Quarter

Sessions settled the following as the proper deductions : namely,

1st. Five per cent. as for interest on 255,000*l.*, the capita. for and actually invested in the purchase of engines, carriages, and all other moveable stock necessary for the business of carriers as conducted by them.

2dly. Twenty per cent. on the same sum as for tenants' profits, and the fair profits of such trade carried on by means of so large a capital, and with such large risks.

3rdly. Twelve-and-a-half per cent. on the said last-mentioned sum, as the fair annual amount of the depreciation of such stock, considered to be in the hands of a tenant from year to year (beyond all needful and usual annual repairs and expenses).

4thly. 198,962*l.* per annum, being the appellants' reasonable annual cost of conducting their business.

5thly. 9150*l.*, the annual value of stations and buildings rated separately in the parishes in which they are situated.

6thly. 30*l.* per mile as for renewing or reproducing rails, chairs, sleepers, &c.

The balance, amounting to the net sum of 135,589*l.*, was taken to be the net annual value of the whole railway, independently of the stations and other buildings, &c., rated separately ; and the sessions found that the railway and other corporeal hereditaments of the company in connection with the railway, might reasonably be expected to let to a tenant from year to year at the last mentioned sum of 135,589*l.*, exclusive of the rent of the stations and other buildings rated separately, such tenant being assumed to have the power of using the railway and all its appurtenances, now the property of the company, under the same circumstances as the company, and with no other privileges and advantages than the company now possess. Of the total net receipts of the company about 30,000*l.* per annum was received in the shape of tolls from other parties using the railway on their own account. Lord Denman, C. J. said, " These deductions taken together seem to us to include whatever is properly referable to the trade, as distinguished from the increased value which that trade gives to the land." . . . " If these are the proper heads of deduction, then the residue must represent the value of the occupation ; and if so, this alone is brought into the rate, and the profits of trade are excluded."

The company contended that an allowance ought to be made for good will. Lord Denman said, " This objection

appears capable of two answers: the first and the decisive one is, that the purchase of good will implies that the trade is sold, that the company are to be bound to surrender their trade to the lessee, and no longer to be carriers on the line; but the calculation of the sessions proceeds on no such supposition; all those special advantages, indeed, for carrying it on which the occupation gives them, whatever those advantages may be, the company must necessarily surrender; but the moment they have leased the railway they would become part of the public, and have the right to carry on their trade, retaining all the good will, with all those advantages which were carefully reserved to the public. Secondly, although the supposition is, that a tenancy is to be created, yet what the incidents of the tenancy must be, as to the actual terms of allowance, must be determined, for the purpose of fixing the amount of the rate, by the actual state of things; for this supposition of a tenancy is only a mode of ascertaining the existing value of the occupation to the existing occupier; now, here, there is no tenancy in fact; no good will is in fact paid for, and therefore no deduction ought to be made on account of its price."

The case of *Regina v. the Great Western Railway Company* was an appeal against the decision of the Quarter Sessions, as to two rates in the parish of Tilehurst in the county of Berks through which the line passed. The company were owners of the Great Western Railway; they were also lessees of two branch lines, but were not liable to repair them; by each of these branch lines the company incurred an annual loss, but these lines caused an increase of traffic on the main line. The company were in the exclusive occupation of these three lines as carriers. In order to ascertain the sum at which the company were to be rated, namely, the rent which a tenant might be found to give from year to year, the parish officers ascertained the gross receipts of one mile in the parish of Tilehurst where there was no station to be 3,680*l.*, and deducted therefrom a proportionate part of the expenses of the three lines amounting in the whole to 257,205*l.* 14*s.* 11*d.* under the following heads; namely:

1. Maintenance of way	-	-	-	£49,643	6	5
2. Locomotive account, including repairs of carriages	74,725	9	0			
3. Carrying account	-	-	-	60,714	15	2
4. General charges, salaries, &c.	-	-	-	23,126	2	11
5. Repairs and alterations of stations and buildings	-	1,682	6	8		
6. Compensation for fire and other accidents	-	1,536	10	0		
7. Government duty on gross receipts from passengers	-	-	-	25,783	4	6
8. Rates and taxes of all kinds actually paid (other than property tax)	-	-	-	11,340	14	8
9. Direction and office expenses	-	-	-	8,643	5	7
10. Annual allowance for depreciation of plant or moveable stock	-	-	-	20,000	0	0
				£277,205	14	11
11. Five per cent. interest on 580,000 <i>l.</i> , value of stock	29,000	0	0			
12. Ten per cent. as tenants' profits, including profits of trade	-	-	-	58,000	0	0
				£87,000	0	0
Gross receipts for one mile	-	-	-	3,680	0	0
Expenses	-	-	£1584	0	0	
Interest and profits	-	-	497	0	0	
				2,081	0	0
				£1,599	0	0

The sum of 1599*l.* was found by the Sessions to be the net rateable value of each mile. The Company claimed further deductions, under the six following heads; namely,

1. The annual value of the buildings and stations	-	£45,000	0	0
2. Depreciation and wear and tear of rails and sleepers (not included in maintenance of way) on the railway, exclusive of the two branches, which expense had theretofore been paid out of the capital	20,000	0	0	
3. Five per cent. interest on 420,000 <i>l.</i> outlay in forming the company, &c.	-	21,000	0	0
4. Income tax	-	10,000	0	0
5. Parochial assessments not actually paid, but which the company anticipated they would have to pay	12,000	0	0	
6. Total annual loss on the two branch lines	-	10,500	0	0
		<hr/>		
		£118,500	0	0



The Company also contended that instead of ascertaining the tenant's profits by a per centage on the original value of the plant or moveable stock, they would be more correctly represented by a per centage of 15 per cent. on the gross receipts. It was held by the Court of Queen's Bench that, in addition to the deductions allowed by the Quarter Sessions, the amount at which the stations and buildings had been separately rated should be deducted. The Court overruled the Company's claims to deductions under the other five heads.

As to the amounts to be allowed under each item of deduction Lord Denman said, in *Regina v. Grand Junction Railway Company*, "We are not competent to give any decision on this point, which is properly for the Sessions."

The stations and buildings connected with railways, are rated separately in the several parishes in which the same are situated.

It appears to be the more usual practice in rating railway property to measure the rate according to the proportion which the mileage of the railway in each parish bears to the whole length of the railway, as if the profits arose equally through the whole line; but it was held in *Regina v. the London and South Western Railway Company*, that the rate should properly be in the proportion that the receipts in each parish for traffic bear to the receipts throughout the whole line.

If the Company retain and work the line themselves, they will be rated on a supposed rent, namely, on the net annual sum, after due deductions made, which it might be supposed that a tenant would give as tenant from year to year, the gross receipts being taken as a test of the annual value. If they lease the line, with all its rights, the lessee will pay on the real rent; or if they demise the line and stations, and become mere carriers on it; or give up the trade as carriers, and become occupiers only, in either of these cases the rate would become apportionable between two classes of occupiers instead of being chargeable on one.

The law as now settled, then, appears clearly to bear hardly and somewhat irregularly on the railway companies; and if it

is to be altered, the interference of Parliament would seem to be necessary. We certainly think that some modification of the law is advisable on public grounds. It is to be remembered that while the profits of the railway are thus, on the one hand, strictly rated, they are limited on the other, by the acts which regulate them. This is a condition in which we may say no other tenant is placed. In all the cases which formed the grounds of the judgments of the Queen's Bench, the owner of the property in question was unrestricted in his gains. This view, which does not seem to have been urged in the course of the argument, appears to us well worthy of attention. Another point is the present tribunal for assessing the rate. Surely the magistrates and their advisers are not the proper body to deal with a question so intricate and important, considering their direct interest in the matter. There should be some easy mode of appeal.

The question has now become one of general interest. If the railways are so highly rated, they must, in justice to their proprietors, raise their fares and charges. This rating question then ceases to be one of local or particular interest.

We have, as our readers will remember, never shown any disposition to favour the undue demands of these companies, more especially in their high and palmy days; but we highly approve of railroads. They have become a necessity, and to no portion of the public are they more serviceable than to the legal profession; no business is more expedited, and to no other is more expense saved by this admirable system of travelling than ours. We think, therefore, that not only should the existing railways be fairly and reasonably supported, but that in due time the extension and completion of the original plans should be encouraged. To use the language of a recent writer, —

“The railways which are in operation have liberated capital, facilitated the operations of trade and commerce, and greatly saved time. What formerly took days or weeks to convey from place to place by canal-boats or waggons, are carried in a few hours by the railway, — and many articles of consumption, such as coal, wheat, dairy and farmyard produce, fish, and live stock, have been greatly cheapened by the facilities thus afforded of sending them into new

and distant markets, with speed and at little cost. We assure the political economists, that the gold and silver which is advanced to make the railways is not made into rails or sleepers. The directors pay it to the contractors, who forthwith hand some of it to the corn merchant, some to the timber merchant, some to the brick maker, some to the parties who have undertaken the masonry, and employ the remainder in paying the wages of the 'navvies' who make the railroad. We have shown the profits on the circulation of wages. What must they be in this case, regularly paid to a horde of labourers, who would probably be out of employment but for works of this description; and who, immediately on receiving their money, distribute it among the neighbouring shopkeepers, in exchange for food and raiment. By and by the railway is opened. The public travel on it, merchandise of all descriptions is carried on it; markets are opened by its means for produce, which, until now, had no means of being sold, from the dearness of carriage, or the distance from the best places of sale; traffic makes traffic. The number of travellers conveyed, and the quantity of goods carried, increase far beyond the original anticipation. The shareholders receive good dividends — probably twice as much as the Funds would yield. Perhaps, too, the shares advance to a premium. At all events, the probability is, that the shareholders gain. If the capital be sent back into circulation, as it must be, — if in the construction of the railway, there be not only profit on the material, but also in the circulation of wages, — if, when it is made and used, it still disburses and circulates wages among the labourers, whom it employs, — lastly, if the shareholders make money, how can the nation lose?"<sup>1</sup>

Agreeing in the main with this, we think that the railway interest now requires some relief, and the mode of rating appears to be that part of the subject to which the early attention of the legislature may reasonably be called. We do not know what authority is to be attached to the following paragraphs, by which it would appear that a new view is gaining ground: —

"We are glad to see that some of the county magistrates are beginning to entertain more just views of the principles upon which railway property, like other property, ought to be rated. An appeal by the London and North Western Company against a rate of 400*l.* per mile was reduced to 200*l.* per mile, it being

<sup>1</sup> Partnership "*en Commandite*," p. 89.

shown that the company derived little profit from it. Even the reduced rate, it is stated by a local contemporary, is 'double the original rent of the land taken by the line.' This is certainly an approach to the system which we noticed recently as having been adopted in Ireland, namely of rating the railway to the same extent as the land thus occupied would have produced had there been no railway." — *Railway Record*, Dec. 1848.<sup>1</sup>

"The London and North Western have successfully withstood the enormous surcharges by the parish authorities of the several districts through which the line passes, and who have evidently been making harvests of no slight amount during the years when the directors had other matters to attend to than the economy of their expenditure. At Warwick the rate for Stoneleigh parish was reduced from 1500*l.* to 500*l.* per mile; in the parishes of Bulkington and Nuneaton, on the Trent Valley, the amount fell from 800*l.* to 400*l.* per mile. Similar appeals have been made in Northamptonshire." — *Railway Chronicle*, January 13. 1849.]

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## ART. XI. — NOTICES OF NEW BOOKS.

I. *New Commentaries on the Laws of England (partly founded on Blackstone).* By HENRY JOHN STEPHEN (Serjeant at Law), 2d edit. in 4 vols. London, 1840.

WE have sometimes endeavoured to imagine what sort of opinion our great commentator would express as to the use which has been made of his work by some of his recent editors. It would turn, we apprehend, on what was his particular taste as to his future fame. Would he prefer the mature and steady glory of a place in most libraries, gradually getting a higher and a higher shelf, shining in beautiful binding, and

<sup>1</sup> A different principle appears, however, to have been adopted in rating the Great Southern and Western Railway, in Ireland. "In an appeal against the assessment of the Attry Poor Law Guardians for the Great Southern and Western (Ireland), the valuation was settled on the clear profits of the Company, viz., 75*l.* a-mile. The rates were accordingly grounded on this." (*Railway Chronicle*, 13th January, 1849.)

recalled to recollection by an occasional reference? or would he still wish to be found on the lawyer's desk and the magistrate's table as a book of actual practice? We know not who is to answer this question, unless it be the honourable member for Wallingford. It is quite obvious that if he had any desire for the latter kind of reputation, he must make up his mind to pass through some species of transmutation. To flourish in perpetual youth, to be the living oracle of the law, it was necessary that he should be put in a caldron and come out, to a great extent, a new creation. Unless he was willing to pass gradually into obscurity, new flesh must come on his bones; for we all know that nothing is so unreadable and, in fact, worthless as a law book which is no longer law. We think, therefore, that on the whole he would feel obliged to some gentlemen who have, in fact, taken considerable liberties with his remains, his *corpus juris*, but whose labours all tend to keep him before the public, and preserve him in daily use. We apprehend, indeed, that any one appealing on this point, in the spirit of Mark Antony, who should

"Show us dead Cæsar's wounds, poor, poor dumb mouths,  
And bid them speak for him;"

or, holding up any given sheet of the work before us, should say,

"Look in this place ran Stephen's scissors through,  
See what a rent the learned Serjeant made;"

would meet but little encouragement either from Blackstone or his present readers. The latter are exceedingly unscrupulous in the matter; what they want is a really useful book, and they will get it if they can. It is, besides, amazing how long lawyers, even under great disadvantage, stick to their old tools. The Real Property student still puzzles himself over the half-obsolete pages of Coke upon Littleton (to which the first conveyancer of the day was willing to add notes), disdaining what was called "the readable edition;" the diligent searcher after Special Pleading lore yet pores over

Saunders, enriched, indeed, by the additions of two living ornaments of the bench; and, in the same spirit, we still prefer beginning and ending with Blackstone. The cannonade, however, which has for the last twenty years been playing on the Commentaries, exposing as they do so wide a front, has rendered them, as they were left by their author, a mere wreck. A stray shot might knock a line out of Coke; a new set of rules might give some partial relief from Saunders, but poor Blackstone at the end of every session bleeds at every pore. What, then, was to be done? Hitherto edition after edition had been called for, and given by editors more or less eminent, who satisfied all necessary requirements by adding a few notes, which cited Mr. Hallam, quoted a case in the Term Reports and a few unimportant statutes. But this could not last; the law reform gales set in, and from every quarter of the heavens came down a deluge of alterations. The annotating plan became worse than useless. To let the student read a whole chapter of text, and to put in a note at the end which was to act as an emetic, to tell him to discharge his mind of all that he had just read, was utterly distasteful. It was, indeed, a Mezentian process to destroy the living by binding with it the dead:—

“*Mortua quin etiam jungebat corpora vivis.*”

The student probably remembered what was repealed, and forgot what had become law; at all events, he had a new trouble added to his not easy task. How, then, could the whole be reanimated? Much still remained, not only unaltered but unequalled for correctness and beautiful statement. Our earlier recollections were, indeed, associated with the book, and we could not bear that our sons and pupils should enter over the threshold with the help of any other conductor. Besides, it is quite unnecessary to say a word as to the great merits of Blackstone in many ways. In this state of things, a new mode of editing the work struck at one time several gentlemen, as Mr. Serjeant Stephen thus relates, — a pretty sure proof whenever it happens, by the by, that the idea, whatever it is, is a good one: —

"It is now many years ago that I first conceived and communicated to my friends in private society, the design of composing a work on the Laws of England, to which the text of Blackstone should be in a great measure contributory; and in 1836 I announced that design to the public. Since this period, several works have issued from the press, purporting to be treatises either on the English Law in general, or on detached portions of it, and containing republications of Blackstone's text, in forms more or less entire, with the intermixture of new matter by the respective editors. While this circumstance affords some testimony to the value of the original conception<sup>1</sup>, there is at the same time no collision between any of these works and my own. With the exception of the general resemblance above pointed out, they will be found to pursue methods entirely remote from that which I have adopted.

"Of the plan and principle of my own work, and of the views on which it was undertaken, it may be right to give some further explanation. Though the celebrated Treatise of Blackstone still remains without a rival, as an introductory and popular work on the Laws of England, the positions it contains have been nevertheless so trenched upon by recent alterations in the law itself, that if the student were to rely upon its text as containing an accurate account of our present system of jurisprudence, he would be led continually astray. The later editions have consequently comprised a copious accompaniment of corrective and supplementary notes at the bottom of the page; but it is not in the nature of such a method (with whatever ability pursued) to give entire satisfaction, because it obliges the reader to transfer his attention incessantly, from the text to the commentary, and augments also, to a considerable degree, the bulk and consequent expense of the volumes. These considerations led me to conceive that a work might prove acceptable, which should be framed upon the plan of introducing the necessary alterations into the text itself; but the question then arose whether it would be better to confine my effort to the reparation of those defects which new legislation and new decisions had occasioned, or to take a bolder course, and, discarding all solicitude about the measure of my ad-

<sup>1</sup> "I do not mean by this expression, to suggest that the works in question are indebted to me for the design on which they are founded. With respect, indeed, to that which first made its appearance, I became apprised, very shortly after my advertisement, that it was in contemplation, and that one of the volumes was far advanced towards completion." — *Serjeant Stephen's note.*

herence to the original work, to interweave my own composition with it, as freely as the purpose of general improvement might seem to require. It was upon the latter plan that I fixed, though with some hesitation, my choice.

“It may be thought, perhaps, that the confidence which carried me thus far, might naturally have tempted me farther, and taught me to aspire to the construction of an entirely new treatise. But if I had been conscious of faculties adequate to such an enterprise, I should still have declined it, as founded, in my judgment, on a wrong principle. The unimpaired portion of Blackstone's Commentaries comprise many passages, which (free in other respects from objection) are so far valuable at least, that they bear the stamp of his authority, and many others whose merit is of the highest order, being distinguished by all the grace and spirit of diction, the justness of thought, and the affluence of various learning, to which he owes his fame. These relics, which are in considerable danger of perishing by their incorporation in a work now falling into decay, may be lawfully converted by any new commentator on the laws to his own purposes; and it is manifestly not less his duty than his interest, to make the appropriation. He cannot reasonably hope to rival their excellence, and to attempt to displace them for original matter of his own, is consequently an injury to the public, and to the science of which he treats.” (Preface to 1st Edition, pp. 3-6; in 2d Edition, pp. 5-8.)

This appears to us to be well stated and true; and on the general idea several works have been brought out and developed, according to the particular plan of the respective authors. In fact, the incorporating mode of editing the work has recently been generally preferred, as we believe, to the annotating mode, and several editions on this plan, by different editors<sup>1</sup>, have been produced with more or less success. Of Mr. Stephen's it is now our business to give some account. This duty we have for some time deferred, and we would willingly, for several reasons, pass by it altogether; but we have been urged to it by several who, perhaps, have the right to require it, and, among others, by the publisher, who is

<sup>1</sup> One of them is Mr. G. A'Beckett's "*Comic Blackstone*," which is by far the most amusing, and not the least instructive. It may be read when more bulky editions cannot.



desirous of having our opinion. We wish it was a more favourable one. We certainly should have said, *à priori*, that for this duty few men possessed the qualifications of the learned Serjeant. In his Treatise on Pleading he showed at once learning, a clear style, a correct taste, and a just appreciation of his subject. In other works and in various ways he has displayed good sense and a discreet and discerning spirit. But in the present work he appears to us to have fallen upon an incorrect plan, and to have become so entangled in it that not even his learning, his laborious industry, or his good sense can extricate him. We rejoice, that while we reluctantly express this conviction the name and reputation of the learned author have already widely diffused his work, of which the second edition is now before us, and that many will be able to correct us if we are wrong; to those who will not examine for themselves, we would only say that they should credit us so far only as we shall be enabled to bring specific proof of what we say. To this ungrateful task we will now at once address ourselves.

In the first place, we object to the arrangement of Mr. Serjeant Stephen's work. We do not think he has given any sufficient reasons for departing from that which Sir M. Hale and Sir W. Blackstone have sanctioned, and with which the profession is familiar. It may be admitted that this is open to technical objections; and it is quite true that the division of Rights into Rights of persons and Rights of things is incorrect. It has been long ago pointed out that, strictly, things can have, of themselves, no *rights*, but that properly this book should have been called rights of persons *in* things. Nor will any one be disposed to dispute the correctness of the remark of Sir M. Hale, cited by Mr. Stephen, that it is better for a student to commence with the study of the *jura rerum* rather than the *jura personarum*. But having all this in his mind, Sir M. Hale thought it best to follow "the usual method of civilians and our ancient common law tractates," and to place the rights of persons before the rights of things. Sir William Blackstone has also followed this arrangement, which has been encouraged and adopted by the profession through twenty-two editions of his Commentaries. We are

all accustomed to it. By following it we know where to find what we want; and even if Mr. Serjeant Stephen had found out a far better plan, he should have very well considered all the consequences of any extensive change before adopting it. There would have been no objection to some minor alterations. Some subjects have grown into importance since the time of Blackstone; the law of Banks, of Highways, not excepting Railways, the Poor Law, and some other matters, might well have been made the subjects of separate chapters; the doctrine of Uses and Trusts demanded a separate investigation; a restatement of the rules as to pleading and practice of the Common Law Courts, and some considerable enlargement of the chapter on Equity were absolutely necessary. These and some other enlargements of certain parts of Blackstone's scheme would have been highly proper, as well as the notice of some points not adverted to by him at all. But Mr. Stephen has done far more than this. He has thrown down Blackstone's superstructure; he has not left one stone upon another, but using the same materials with some more of his own, he has built it all up in a totally different fashion. The arrangement and titles of books, chapters, and often of sections, are totally different. And what have we gained by this new arrangement? We should have hoped that we might have gained, at all events, a scheme or system of law greatly to be preferred to Blackstone's. It might be true that it was troublesome, in the first place, to master, but when once learned, we expected it would have placed at our service an arrangement of which the lucidity and symmetry were quite apparent. The work is divided into six books: I. Of Personal Rights; II. Of Rights of Property; III. Of Rights in Private Relations; IV. Of Public Rights; V. Of Civil Injuries; and VI. Of Crimes. The first is disposed of by the author in 14 pages, the second takes 532. To the third 80 only are devoted. To the fourth 647, to the fifth 442, and to the sixth 468. So that it cannot be said that the arrangement is symmetrical. The reasons for the distinction between personal rights and rights in private relations are, as it appears to us, not sufficiently clear; nor do we think the term *personal* rights, as limited by Serjeant

Stephen, correct. Altogether we must prefer, for practical use, the arrangement of Blackstone, and we do not think that any one will be disposed to follow the learned Serjeant in his departure from it.

But granting that the new arrangement is a good one, we have a more serious objection to the mode in which the learned author has worked up his materials. With curious labour, he takes parts of several of Blackstone's chapters to compose a new one; and again, he sometimes divides one of Blackstone's chapters into two or more of his own. The mind is perpetually on the inquiry as to which is Blackstone's or which is Stephen's,—where the Judge ceases and where the Serjeant begins,—where the voice of the dead is heard and where the living "takes up the wondrous tale." Nor is there any possible mode of finding this out except by reading the whole four volumes of Blackstone through, and comparing them line by line with the four volumes of Mr. Stephen. It is true the Serjeant has endeavoured to show this by a certain method which he thus describes in a "Notice to the Reader." "The portions of this work which lie between brackets [ ] are taken, *without alteration*, from the text of Blackstone; *for the rest, the present author is responsible.*"

Now we are quite satisfied that the learned Serjeant wished to act with the utmost candour in this notice to the reader. He has pursued the bracket system to a painful extent, and sometimes to the enclosing an immaterial sentence, or even an insignificant word. But with all his care, he has been overcome by the impracticable nature of his own plan. We shall show that in spite of himself, many portions of his text enclosed in brackets are not the text of Blackstone "without alteration," and on the other hand, many portions out of the brackets are, in fact, the very words of Blackstone. If Mr. Stephen had given us some reference to the original book, chapter, or page of Blackstone, by a marginal reference either at the side or at the bottom of the page, we might have easily corrected our impressions of Blackstone by the lights of the learned Serjeant; but as we have no such reference, this is rendered exceedingly difficult. With the best possible

intention, the author has, in this respect, defeated his own purpose, of attributing to each his own share of the work.

Of this we shall give one or two instances.

Let us first notice some passages where the learned author professes to give the exact text of Blackstone, by enclosing it in brackets, but, in fact, has either omitted or altered some part of it. We shall call the attention of the reader to vol. i. of Blackstone, *Christian's Edition*, p. 68. Speaking of the Common Law, Blackstone says : —

“ This is that law by which proceedings and determinations in the ordinary courts of justice are guided and directed ; this for the most part settles the course in which lands descend by inheritance ; the manner and form of acquiring and transferring property ; the solemnities and obligation of contracts ; the rules of expounding wills, deeds, and acts of parliament ; the respective remedies of civil injuries, &c. ; *the several species of temporal offences, with the manner and degree of punishment* ; and an infinite number of minuter particulars,” &c.

Now in the first vol. of the new Commentaries, at p. 46., Mr. Stephen encloses this part of the text in brackets, but omits the sentence in italics : why, we cannot imagine. If the manner and degree of punishment of temporal offences have been recently regulated by act of parliament, so have the laws of inheritance, the forms of transferring property, the rules of expounding wills, while the several species of temporal offences rest chiefly on the Common Law ; at all events nearly as much as they did in the time of Blackstone. At all events, if Mr. Stephen thought it right to strike out these words, he should, after his “ notice to the reader,” have mentioned it, with his reasons for doing so.

Again, at p. 79. of the Introduction, Blackstone says : —

“ By the custom of gavelkind an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple or for ever. Yet this custom does not empower him to use any other conveyance, *or even to lease them for seven years*, for the custom must be strictly pursued.”

Mr. Stephen encloses this in brackets, but omits the words in italics, without any explanation. It may be quite true

that the words struck out are bad law, but some reason should have been given for the omission, or else these words should have been left *valeant quantum*.

We will give another omission without explanation or comment, which appears to us even more remarkable. In the chapter on the King's [or Queen's] Royal Family, after stating that the queen consort is guilty of high treason in case of infidelity, Blackstone has the following passage, vol. i. p. 222. :—

“The husband of a queen regnant, as Prince George of Denmark was to Queen Anne, is her subject, and may be guilty of high treason against her; but in the instance of conjugal infidelity he is not subjected to the same penal restriction. For which the reason seems to be, that if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.”

Mr. Serjeant Stephen thus gives the passage, vol. ii. p. 424. :—

[The husband of a queen regnant, as Prince George of Denmark was to Queen Anne] and as His Royal Highness Prince Albert now is to Her Majesty [is her subject].

Omitting all the rest of the passage, and leaving us entirely in doubt whether in Mr. Stephen's opinion it is to be considered as law.

Again, speaking of the Clergy, Blackstone says, vol. i. p. 376. :—

“The personal exemptions do indeed for the most part continue.”

Serjeant Stephen puts this out of brackets, vol. iii. p. 4., in this way :—

“The personal exemptions do indeed for the most part continue.”

A few lines further Blackstone goes on thus :—

“A clergyman cannot be compelled to serve on a jury, nor to appear at a court leet or view of frankpledge, which almost every other person is obliged to do: but if a layman is summoned on a

*jury, and before the trial takes orders, he shall notwithstanding appear to be sworn. Neither can he be chosen to any temporal office, as bailiff, reeve, constable or the like," &c.*

The passage thus stands in 3 Stephen, p. 4. : —

["A clergyman cannot be compelled to serve on a jury, nor can he be chosen to any temporal office as bailiff, reeve, constable or the like," &c.]

Surely it cannot be properly said that this is giving the text of Blackstone without alteration. The portion of the text in italics omitted is surely of some value,—at all events it is *the text*.

So, speaking of Corporations, Blackstone says that the King's consent is given either by act of parliament or charter. "By act of parliament, of which the royal assent is a *necessary* ingredient, corporations may undoubtedly be created." (Vol. i. p. 473.)

Serjeant Stephen gives this passage in brackets, but prints it thus : —

["By an act of parliament, of which the royal assent is an *indispensable* ingredient," &c. (Vol. iii. p. 123.)

And a little before, alluding to Oxford and Cambridge, as ranking as lay civil corporations, Blackstone says : —

"Among these *I am induced to think* the general corporate bodies of the universities of Oxford and Cambridge must be ranked; for it is clear they are not spiritual or ecclesiastical corporations, though stipends are annexed to particular magistrates or professors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty; *they seem, therefore, to be merely civil corporations.*" (Vol. i. p. 471.)

Mr. Serjeant Stephen places this passage in brackets, but omits the English words in italics (vol. iii. p. 123.), which somewhat qualify Blackstone's opinion.

Again, in vol. i. p. 343., speaking of the Sheriff, Blackstone says he is "to *decide* the election of knights of the shire."

Mr. Stephen (vol. ii. p. 595.) changes the word *decide* into "*superintend*."

Many of these alterations are minute, but we cannot think that they are justifiable.

We do not profess to have gone through the whole of Mr. Stephen's four volumes in this manner, because, as he gives no reference to book, chapter, or page, this is exceedingly difficult; but we have examined a considerable portion of it, and the result of our labour is, that we cannot tell with precision what portion is the author's, and what the editor's; and we have found that the brackets are frequently more calculated (quite unintentionally on Mr. Stephen's part, as we certainly believe) to mislead than to assist, and that in this way incorrect ideas are conveyed to the reader's mind.

We pass on to notice some instances in which the author places out of brackets certain portions of Blackstone, and thus, according to his notice, leads the reader, as we conceive, to suppose that they are his own. This constantly occurs more or less throughout the whole four volumes, because sometimes (not always, as we have seen), if the slightest alteration is made by the author, he does not hesitate to place it out of the brackets, and giving no regular reference to the portion so taken, it is difficult to find how much has been altered. But in some cases, portions of pure Blackstone are placed out of the brackets. To show this, we must cite the parallel passages in Blackstone and Serjeant Stephen.

In the former (Introd. p. 76.), Blackstone says, —

"As to gavelkind and borough-English, the law takes particular notice of them, and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases (both to show the existence of the custom, as 'that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female'; and also to show 'that the lands in question are within that manor,') is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in 'the same court."

In *Serjeant Stephen* (Introd. p. 56.), it runs thus: —

“As to the modes of descent in gavelkind, and borough-English, the law takes particular notice of them, and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. [The trial in both cases (both to show the existence of the custom, as, ‘that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female,’ and also to show ‘that the lands in question are within that manor,’) is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court.”

It seems to us obvious, according to the editor's plan, as stated, that the bracket should have been placed at the word “gavelkind,” and not at the words “The trial.” In another instance, at p. 68., in which the learned *Serjeant* places out of brackets a considerable portion of *Blackstone* (Introd. p. 85.), beginning with the word “First,” and ending with the word “pleaded,” Mr. *Stephen* seems to claim this as his own in both editions, after making some very trifling alterations, while on other occasions he gives *Blackstone* all the benefit of a single word.

Now of course we do not think for a moment that the learned *Serjeant* intended in any way to mislead. We only submit to the reader that he has adopted a plan which is in fact impracticable, even in hands so able and learned as his own.

Having thus freely pointed out what we consider the chief defects of this work, we turn with no little pleasure to its merits. These four volumes furnish a learned, and very frequently a popular statement of the law of this country, brought down to the commencement of 1848; and great labour has evidently been bestowed in giving the effect of all the recent and most numerous statutory alterations in the law. These the learned *Serjeant* almost always approves, thus giving his sanction to the efforts made for the improvement of the law. Indeed, a liberal and truly charitable spirit pervades the whole work. His succinct account of the



alterations effected within the last few years by act of parliament is highly instructive and useful, and we may refer particularly to the Chapters in the Fourth Book "On the Laws relating to the Poor," "On Charitable and Benevolent Institutions, Lunatic Asylums, Gaols, Highways, the Sanatory Condition of the People, Public Carriages, the Press, Professions, Banks, and Births, Deaths and Marriages," as being highly useful, and (subject to some inaccuracies too few and unimportant to notice) we may add that the work as a whole is sound and correct in its law. We need not say to any one who knows the subject that it is next to impossible to support our opinion by any extract from a work of this nature.

We cannot conclude this imperfect notice of this important work without expressing a hope that in a future edition the learned author may be induced to make some alterations in it. Its arrangement we do not expect him to abandon; but on the points on which we have principally dwelt, because they greatly impede the practical utility of the whole, we would fain hope he might be induced to reconsider his plan. We would then earnestly recommend that he should throw out the brackets altogether, then refer in the usual way to his obligations to Blackstone, by a side or foot note, but take upon himself the responsibility of the whole statement of the law which he gives. We may also mention a minor defect, — the entire absence of marginal notes, which we hope may be supplied. Having abandoned the arrangement of Blackstone, let him not hamper himself with his language, but, adopting what he pleases, let him add or alter when he thinks best, and we assure him that his work, which has now as it stands great merit, will be not only more useful, but far more adapted to show what part of it is borrowed, and what is original.

**II. *A Supplement to a Treatise on the Law of Perpetuity; embracing all the Authorities on the Subject of the original Work since its publication.*** By WILLIAM DAVID LEWIS, of Lincoln's Inn and Gray's Inn, Barrister-at-Law, and Lecturer on the Law of Real Property, &c., in Gray's Inn. London, 1849.

THE author of the excellent Treatise on Perpetuities, published in 1843, has now added a Supplement to that work, with the view of bringing before the profession, in a connected form, the various cases which, since the original publication, have been decided or reported upon points in the Law of Perpetuities. While it is surprising to find that so many decisions have occurred upon this subject during the short space of five years, the circumstance proves clearly (if proof were wanting) that the rule against perpetuities is a most important article in our jurisprudence, and that Mr. Lewis did not err in supposing that an attempt to unfold the principles, and explain the practical application of it, might prove a serviceable addition to our law libraries.

The present work commences with a short sketch of our recent legislation, in which, as Mr. Lewis considers, "the principles of the Law of England so decidedly favourable to freedom in the alienation of land," have been "consistently and largely applied." We are glad to find that Mr. Lewis is not entirely without sympathy for the progressive improvement of our law of real property, as is shown in the following passage, in which he enumerates the statutes passed in reference to the transfer of land during the last few years:—

"During the last five years the principles of the law of England so decidedly favourable to freedom in the alienation of land, have been consistently and largely applied in practical legislation. The law has not contented itself with a philosophic preference of the theory of free commerce in land, but has diligently acted out the

spirit of those vigorous examples of past times, of which the unfettering of entails by fine and recovery (in contradiction of the baronial policy of our first Edward's era) was chief and foremost. Our long line of statutes against mortmain, again, have not been suffered to bear their witness to a policy which successive ages have acknowledged to be just and necessary, without allowing ramifications of it in other departments of the law which, though possibly less conspicuous and important than mortmain and entails, may yet contain, according to their measure, a capacity of producing the same evils which mortmain and entail would have involved, but for the judicial correction applied to the one, and the legislative limitation assigned to the other.

"Thus, simplicity in the transfer of land has been promoted by a well considered and scientifically constructed enactment that all corporeal tenements and hereditaments shall, as regards the conveyance thereof, be deemed to lie in grant; but this provision is permissive and optional only, for the land is to be considered as lying in grant, *as well as in livery*, which leaves still open to the discretion of a purchaser the adoption of the ancient feoffment. Transactions and forms of assurance to which an inconvenient and burdensome condition in law was impliedly annexed, such as exchanges and partitions, are now relieved of the incidental condition. An immediate estate and the benefit of a condition or covenant may be conferred by an indenture upon a person who is not named a party to it. Contingent and executory interests and possibilities coupled with an interest in land, may now be aliened by deed, no less than by will. The reversion expectant on a lease may be surrendered or merged at discretion, without the disagreeable result of an extinguishment of the incidents to the reversion, in exoneration of the lessees. The 'difficulty, delay, and expense' attending the assignment of satisfied terms, which 'operated in many cases to the prejudice of the persons justly entitled to the lands,' have been removed by rendering the assignment of such terms unnecessary. The 'extended investment of capital in the permanent improvement of the soil,' has been encouraged, by enabling proprietors under disability to make permanent improvements in the lands, charging the expense of effecting them on the inheritance of the land; thus rendering alienable *pro tanto* lands placed in settlement. Purchasers and others 'whose titles were intended to be secured' by fines levied and recoveries suffered in the lately abolished Courts of Great Sessions in Wales and Che-

shire, have been protected from the 'danger of having those titles impeached' by reason of the 'irregularity and carelessness' with which the records of such fines and recoveries were in many cases 'engrossed and kept.' The rights and capacities in respect to the acquisition of land, which are enjoyed by natural-born subjects of the kingdom, have been rendered accessible to aliens, without the tedious and expensive process of an act of naturalisation. The duties upon the purchase-money arising or payable by virtue of any sale by auction have been abolished. Important facilities have been provided for 'the inclosure and improvement of common and other lands subject to rights of property, occupation, or enjoyment, which obstruct cultivation and the productive employment of labour,' and for partitions and exchanges of lands, and for 'divisions of lands intermixed or divided into inconvenient parcels,' when beneficial to the respective owners. The powers of leasing, managing, and improving the possessions and land revenues of the Crown have been considerably extended.

"The transfer of real property in Scotland has been facilitated, by 'simplifying the form and diminishing the expense of obtaining infestment in heritable property' there; and by facilitating the 'constitution,' and 'transmission and extinction of heritable securities for debt' in that country; and by facilitating 'the transference of lands and other heritages' in Scotland, not held in burgage tenure; and again, by facilitating the transference of lands and other heritages there, held by the tenure of burgage. And, more important still than these enactments, is the amendment of the law of Entail in Scotland, which law was 'attended with serious evils, both to the heirs of entail, and to the community at large.'

"Great facilities, again, have been given for the permanent improvement of landed property in Ireland, authorising the advance of trust monies for that purpose, and for the sale of estates situate in that part of the kingdom which are charged with incumbrances (an act of the greatest possible interest and importance). Besides these provisions, further facilities have been afforded for the transfer of landed property in Ireland, by diminishing the expense of registry searches, and by freeing the land from liability in respect of bonds and recognisances to the Crown, passed or entered into at remote periods.

"Thus nobly and efficiently has our modern Legislature exerted itself to secure to the community the full benefit of that enlarged and wholesome principle of public policy, which centuries ago led

the Judges of England to abolish perpetuity in entails, and its Legislature to restrict alienation in mortmain. Wise and salutary legislation such as this, reflects enduring credit upon our age and country, no less than upon the lawgivers, who have so accurately appreciated the exigencies and interests of that age and country."

There are several topics of considerable interest and importance which the author has discussed at some length in this book. He inquires, for example, whether the statutes recently passed to enable persons interested under contingent or executory limitations of land, to alienate and dispose of those interests, avail to render valid a contingent or executory limitation, which would in other respects be too remote, when it happens that the future gift is made to a person *in esse* and ascertained, who might forthwith *dispose of* the interest. Our author's conclusion is, (p. 20.) that the alteration made by the statutes alluded to, has not at all contracted the scope of the rule against perpetuities, which, as he says, operates to render void remote executory and future gifts, precisely to the same extent as when those interests were not subjects of alienation at Common Law.

Another point discussed by Mr. Lewis, (pp. 27—64.) is, whether in determining the validity or invalidity of testamentary dispositions under the rule against perpetuities, it is permitted to advert to events taking place subsequently to the *date of the will*, and before the *death* of the testator; and our author concludes, after a very full inquiry into the principles and authorities bearing upon the question, that by our law, the validity of testamentary gifts is to be determined by circumstances as they exist at the time of the testator's death, and not those merely which happen before the will is made,

Mr. Lewis then classifies concisely under thirty-nine heads, (pp. 68—96.) the various decisions since the publication of his former work upon Limitations, made to depend on a failure of heirs or issue. Two or three of the cases are remarked upon and doubted, as not consistent, in the author's view, with previous established authorities.

The important question raised by Mr. Lewis in his pre-

vious work, and also discussed by him in an Essay published in 1844, whether contingent remainders are within the rule against perpetuities, is here again introduced, (pp. 97—143.) with "such further considerations as may complete and mature the body of argument sustaining the proposition under review." (p. 97.) The author expresses undiminished confidence in his doctrine that contingent remainders may be obnoxious to the operation of the rule against perpetuities, which the decision of the House of Lords in *Cole v. Sewell* has not at all affected.

Mr. Lewis then treats of the doctrine of *cy près*, expressing doubts concerning the important decision in *Vanderplook v. King*, 3 Hare, 1.

Another very considerable question argued in this book is the validity or invalidity of a trust or direction for accumulation of rents during the minorities of infant tenants in tail, in reference to which our author finds occasion to remark upon *Browne v. Stoughton*, 14 Sim. 369.

Various other interesting questions in the Law of Perpetuities are incidentally noticed; and we think that those who have found the former Treatise on Perpetuities useful and serviceable will do well to procure this Supplement to it; for, undoubtedly, doctrines are discussed in it, than which there are, perhaps, scarcely any of greater moment in any branch of our system of Real Property Law. The reputation of the original work, we need hardly say, is exceeded by no other work in the profession. It is not only sound in its principles, but is written in a manner to attract the attention of the student; and the same commendation may be justly bestowed on the Supplement.

III. *Concise Precedents of Wills, with an Introduction and Practical Notes*. By JAMES TRAILL CHRISTIE, Esq., Barrister. London, 1849.

MR. TRAILL CHRISTIE has here given us a useful and practical work. In his Preface he says that he has been led to its compilation by "the important changes that have taken

place relating to wills and to conveyancing in general, and the feeling prevalent among the profession in favour of a more concise method of preparing legal instruments than has hitherto generally obtained." The forms appear to us to be safe and correct, and having had occasion to prepare one or two wills since this little book was in our hands, we have found that we were enabled by its help to do so very readily. This, we think, is the best commendation we can give to it. The author speaks of his own notes very modestly, but we have found them very useful and apposite.

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ART. XII.—PROSPECTS OF THE SESSION.—  
POSTSCRIPT.

1. *The Delay in the Offices of the Masters in Chancery, and the Remedy.* By CHARLES PURTON COOPER, Esq., one of Her Majesty's Counsel. Stevens and Norton, 1849.
2. *On the Economic Causes of the present State of Agriculture in Ireland.* Parts 1 & 2. Papers read before the Dublin Statistical Society. By NEILSON HANCOCK, LL.B. Hodges and Smith, Dublin, 1848, 1849.

THERE are three subjects which we have kept prominently in view in the conduct of this work, and of which we do not intend to lose sight: Chancery Reform, Conveyancing Reform, and the Revising of Bills in Parliament. It is idle, in reviewing our labours, to attempt to settle precedence as to what was first proposed by this person, or who had the priority in that idea; it is sufficient for us to see the plans that we have proposed adopted by others better qualified to do them justice; and whether they have taken our buckets to draw up the truth, or used their own vessels, is of no importance. It is no small pleasure to us to find that these subjects are now thought sufficiently important and interesting to be brought daily and weekly before

the public by the first writers of the first press in the world; and so that they will continue to help the cause, be theirs the honour and the profit. We are quite satisfied that these matters, which were a few years ago only interesting to a few, and as to which we were warned again and again that no way could be made, must occupy a great part of the time of the Session of Parliament just about to commence, with a view to effecting a settlement of them, and that the zeal and learning of our countrymen are now devoted to this object. As the old bird said to her young ones when she heard the farmer was coming himself to cut down the corn, so as the Lord Chancellor is going to put in his sickle, we also say to our readers, "the harvest is now at hand."

1. If rumour, accompanied by many corroborative circumstances, does not entirely err, we shall soon hear of Chancery Reform from the Woolsack. In the mean time let us give some space to the plan of Mr. C. P. Cooper, who has a right to be heard as an old and laborious Law Reformer. Passing by a set of proposed orders, which provide for a new procedure for the Master's office, and which among other things would call into existence not only public accountants, to be called "Accountants to the Offices of the Masters," but also "Conveyancing Counsel to the Offices of the Masters," and "Solicitors to the Offices of the Masters," we prefix nearly verbatim the portion of Mr. Cooper's pamphlet which relates to certain "Improvements, the adoption of which he has hitherto been content to urge in conversation."

"The three main subjects of Chancery suits and proceedings are: — I. The construction of wills, marriage settlements, and other written instruments. II. The appointment of guardians, and the allowance of maintenance to infants. III. The administration of the estates of testators and intestates.

"Regulations somewhat of the nature of those ensuing would, as the writer apprehends, much diminish expense and delay.

"I. The construction of wills, marriage settlements, and other written instruments.

"1. In all cases in which the only question is the construction of a written instrument, any party interested shall be at liberty to serve a statement of his claim thereunder upon all other parties having, or supposing to have, an interest, and the Court shall have



power, upon the appearance of all parties, or upon due proof of service of such statement of claim upon them, to make a declaration of the rights of all parties under such instrument.

"2. Such declaration may extend to cases of that kind which are embraced by the Scotch declaratory action.

"A large proportion of short causes involve the construction of some written instrument merely. No fact is in dispute. The meaning of a few lines—of a few words, is the only embarrassment. Nothing more is wanted by the parties for their guidance—to enable them to alien, encumber, settle, devise—than a declaration of the Court. What is there apart from old prejudice, which we are fast getting rid of, to prevent this from being obtained without the cumbrous and expensive machinery of bill and answer?

"II. The appointment of guardians, and the allowance of maintenance to infants.

"1. Any one, upon an affidavit stating the requisite facts, shall be at liberty to apply to the Master to appoint guardians to infants, and to make an allowance for their maintenance.

"2. In cases in which there is no dissatisfaction with the decision of the Master, his certificate stating the names of the guardians and the amount allowed for maintenance sufficient.

"The petition for a reference is a useless expense, and the petition for the confirmation of the Master's Report, where there is no dissatisfaction, is equally a useless expense.

"3. In cases where the parties are dissatisfied with the decision of the Master, he shall make his report of the proceedings before him in the usual way, to give opportunity of an appeal to the Court.

"In cases belonging to this class the Master shall be at liberty to dispense with strictly legal evidence of facts respecting which there is no dispute, when such strictly legal evidence cannot be obtained without delay or expense.

"The writer has known proceedings in cases of this kind suspended for twelve months, the Master requiring the best evidence of the identity and ages of the infants, which could only be procured from the East Indies. The Court cannot be too difficult as to the evidence received where a fund is to be distributed. But in questions of guardian and maintenance may it not, without incurring an imputation of rashness, be thought—no one suggesting any doubt—that evidence of a degree less high may safely be admitted, when none better can be had without additional delay or expense?

“ III. The administration of the estates of testators and intestates.

1. Creditors, legatees, annuitants, widows, and next of kin, shall be at liberty, without bill or petition, by summons before one of the Masters, upon affidavit of their claims, to call upon personal representatives to pay or secure the same.

“ 2. Assets being admitted, the Master shall have powers, in reference to ordering payment, &c. analogous to those of the judges of the small debts and demands courts.

“ 3. Assets not being admitted, the Master shall have power to appoint a receiver, to direct a sale of all or any part of the assets (the proceeds being paid into Court to the credit of the matter), to advertise for creditors, legatees, next of kin, and to distribute the fund. (See the Joint Stock Companies Winding-up Act.)

“ 4. The Master's order of distribution shall bind all parties interested, in like manner as if such distribution were made by decree or order in a suit.

“ 5. The Master, at the request of parties dissatisfied with his decision, shall grant a certificate of such decision, with the evidence and grounds upon which he has proceeded; and such parties shall be at liberty to apply to the Court upon the footing of such certificate, and without objections or exceptions, to reverse or alter the Master's decision.

“ The ensuing regulations may be applied to matters of litigation not falling under any particular head.

“ 1. Where an equitable question depends upon facts, respecting which there is no dispute between the parties, they shall be at liberty, without bill or answer, or petition, or affidavit, but upon a case stated and signed by them or their solicitors, to obtain the decision of the Master of the Rolls, or one of the Vice-Chancellors upon such question.

“ 2. Such decision shall bind the right, unless reversed upon appeal to the Lord Chancellor or House of Lords.

“ 3. Where an equitable question depends upon facts, respecting which all the parties interested are not agreed, it shall be lawful for any of the parties to apply to the Master of the Rolls, or one of the Vice-Chancellors, by motion in a summary way, without bill or answer, or petition, but upon an affidavit stating the facts respecting which the parties are agreed, and the facts respecting which they are not agreed; when the Master of the Rolls or Vice-Chancellor may, if the case shall appear to be one in which such a course can be adopted without probable inconvenience, refer it to the Master to ascertain and find the disputed facts.

"4. Notice of such motion to be served on all parties interested. If any party interested neglect to appear, the Court, upon proof of such service, shall have power to make the order in the absence of such party.

"Regulations will be requisite with regard to the proceedings before the Master upon such reference.

"Regulations will also be requisite providing for an appeal to the Court, if any of the parties shall be dissatisfied with the Master's finding of the facts.

"It will, besides, be necessary to have regulations providing for a statement of the case, after the facts found and ascertained.

"5. The facts respecting which the parties were not agreed having been ascertained and found, the decision of the Master of the Rolls or Vice-Chancellor, upon the equitable question depending, may then be obtained.

"6. Such decision shall in like manner bind the right, unless reversed upon appeal to the Lord Chancellor or House of Lords."

If some of the reforms proposed could be carried, it would be nearly as cheap to obtain the opinion of the Court of Chancery as to obtain the opinion of an eminent counsel.

Our own opinion on the subject was given at length in our last Number.<sup>1</sup>

2. Let us next turn to the Law of Real Property, and we shall see that here also the views which we have promulgated are gaining strength; and we shall not be surprised, if a measure on this subject is not proposed by the Government, that competent persons will be found to undertake it. As nearly two years have elapsed since the appointment of the Registration and Conveyancing Commission, we think it is not unreasonable to suppose that the Commissioners will now present their Report. But if this should not be done, we apprehend some step ought soon to be taken, by which a subject, felt to be so deeply important by a great many persons, may properly be brought before Parliament. If no other reason could be given, it is to be observed that the terms of the Commission do not extend to Ireland, and it is in this country that the most pressing need for legislation in this matter is felt. The Irish Incumbered Estates Act can only be taken as a step towards a better measure,

<sup>1</sup> See Art. I. The Judge-Master question. See also *post*, p. 447.

and as such we highly value it ; but nobody disputes that further legislation must take place. As evidence of this feeling, we may mention that the Dublin Statistical Society, which has been recently formed under the auspices of Archbishop Whateley, has appointed a committee to consider the means of facilitating the transfer of land, and that several very valuable papers on this subject have been read before the Society by the late and present Professors of Political Economy of Dublin University, Dr. Longfield and Mr. Neilson Hancock. These learned persons chiefly adopt the views which have been recently published under the sanction of the Law Amendment Society, but in many cases enlarge upon them, and present them with a special view to their adoption in that country. We are very glad that Political Economists, both here and in the sister country, are turning their attention to the transfer of land. Previous to the Report of the Burdens of Land Committee, it is surprising to us how little was said by them upon this subject. They were probably deterred by the dread of the technicalities which have hitherto surrounded the subject. But they are now disposed to make up for their past neglect, and Mr. John Mill in his recent book, and now Professor Hancock, seem fully aware of the importance of investigating and explaining the true rules which should govern all our dealings with land, and which so deeply affect its value. We shall make some considerable extracts from these papers, as they greatly corroborate our own views on this subject.

“It has been long ago demonstrated, and is admitted by every economist of any reputation, that every impediment to the freedom of purchase and of sale, and every circumstance creating insecurity for the employment of capital, to the extent of their operation impede the prosperity and improvement of the manufacture or trade to which they apply. I am not venturing on a very rash hypothesis, then, in stating that we may expect the same causes to produce the same effects in agriculture, which we know they produce in every other trade and manufacture. The main causes, then, to which I ascribe the present state of agriculture in Ireland are, the legal impediments to the free transfer and sale of land, whether waste or improved ; and the legal impediments to the application of capital to agricultural operations.”

Having thus started, the learned Professor then goes on, —

“To proceed, however, with a consideration of the legal impediments arising from the cost of transfer, I shall notice some instances which have been furnished to me by an experienced solicitor, illustrating the extent to which the cost of transfer impedes the sale of land. 1st, a case of sale of land for 1,200*l.*; the costs to vendor and purchaser together amounted to 200*l.*, being about seventeen per cent., or one sixth of the purchase-money. 2nd, a sale for 500*l.*, where the costs to one party alone were 124*l.*, being twenty-five per cent., or one fourth of the purchase money. 3rd, a sale for 250*l.*, where the costs to one party alone were 40*l.*, being sixteen per cent. or about one-sixth of the purchase-money. 4th, a sale for 280*l.*, where the costs to one party alone were 19*l.*, being about eight per cent. 5th, a sale for 150*l.*, where the costs to one party alone were 23*l.*, or about sixteen per cent. The costs do not increase in proportion where the purchase-money is very large. Thus, in a case where it was 5,000*l.*, the costs to one party were only 152*l.*, or about three per cent. and another case where the purchase-money was 30,000*l.*, the costs were only 900*l.*, or about three per cent.

“But the amount of money actually paid by the vendor and purchaser represents only a part of the cost of transfer. There is, besides, the delay between the sale and the completion of title; and also a threefold risk incurred, arising from the uncertainty as to the amount of the legal expenses, and the uncertainty as to the period within which the transaction can be completed; and lastly, after every care, the risk of the title turning out defective. There is also the loss of time and labour incurred by the vendor and purchaser themselves, which, if valued at the market price of their exertions, would make a considerable addition to the amount already mentioned as actually paid on the transfer of land.

“I need not dwell on the impolicy of keeping up this enormous cost of transfer. The effect of it is to prevent the land getting into the hands of those who can make the most of it. As far as this cost arises from the state of the law, it is a tax burdensome on the community, and unproductive to the exchequer. To show, however, that this cost arises from the state of the law, and could be easily diminished, it will be convenient to analyse its causes, and to point out how they may be removed. The cost of transfer of land may be divided into the following four distinct elements: the expense, delay, and risk attending the investigation of title; the expense of searches for incumbrances; the stamps on searches and conveyances; and the length of conveyances.

“The first of these elements, which is the only one I shall have time to notice at present, arises entirely from the rule of law, that the vendor of land must produce sixty years’ title to every acre that he sells. How could other trades be carried on if a similar rule were enforced? What would be thought of a law that compelled you to examine the title to the leather every time you bought a pair of shoes? How could the cotton trade be carried on, if the spinner could not buy a bale in Liverpool without tracing the title from the time the plant was grown in Louisiana, and sending to New Orleans to search for incumbrances? Or how, again, could the tea trade be carried on, if an abstract of title had to be submitted with every chest, showing all the hands it had passed through from the time it left the banks of the Ho-ang-ho?”

And Mr. Hancock then proposes his remedy; and our readers must not be surprised if the necessity of the case will suggest a somewhat startling one.

“So great is the element of cost arising from the examination of title, that in the sale of leaseholds it is almost always dispensed with as far as the title of the lessor is concerned; and, in the case of sales of small portions of freehold, it is frequently dispensed with, the parties preferring to trust to the chance of the title being bad to incur the necessary expense of getting a perfect security. But this rule admits of a very easy remedy, by extending to land the principle of market *overt* so wisely established in the case of all other kinds of property. The principle of market *overt* is well stated by our great law commentator, Blackstone: — ‘Property may, in some cases, be transferred by sale, though the vendor hath no right at all in the goods; for it is expedient that the buyer, by taking proper precaution, may, at all events, be secure of his purchase; otherwise all commerce between man and man must soon be at an end. Therefore, the general rule of law is, that all sales and contracts of any thing vendible in fairs or markets *overt*, shall not only be good between the parties, but also binding on all those who have any right or property therein.’

“In order to extend this general rule of law to land, three things would be necessary: First, a general register of all land, containing the names of those having the first estate, and also the names of those having subsequent estates, and also the names of all those having charges or incumbrances affecting it; secondly, the establishment of periodical public sales of land by auction, in each county in Ireland, to be deemed markets *overt*; thirdly, the enactment, as a general rule of law, of the principle, now sanctioned in

particular instances, that the limitations and incumbrances affecting any land should, on its being sold, be transferred to the fund arising from the sale.

“If these preliminary arrangements were adopted, the doctrine of market *overt* might be safely extended to land by enacting, first, in the case of land registered as belonging to a party having an estate in fee, without any other parties appearing in the register, either as having subsequent interests, or incumbrances, that the land might be transferred by the registered party executing a form or transfer, somewhat similar to that now used in the sale of stock in the funds; secondly, in the case of land where the party having the first estate had only a limited interest, on account of there being either subsequent estates or incumbrances appearing on the register, that such party having the first estate, or any incumbrancer authorised by contract or by law to do so, might proceed to sell the land at one of the periodical sales, on giving notice to the registrar of the country, and advertising for three months previous to the sale; the registrar being required to give notice to all parties appearing on the register as interested in the land. That the highest bidder at such sale, on paying the purchase-money into the Court of Chancery, to the credit of the parties so appearing to be interested, should acquire an absolute estate in fee-simple in the land, discharged of all prior estates, interests, or incumbrances, except leases or other contracts with tenants; the limitations, charges, or incumbrances previously affecting the land being all transferred to the purchase-money so paid into court.

“It might be objected to this plan, that the incumbrancer might be defrauded by the land being sold for less than its real value. The remedy, however, for such an event is in the hands of each incumbrancer; he has full notice of the sale; if he thinks the land is going too cheap, let him bid more for it and become the purchaser. At present parties are deterred from buying land to sell again, because the enormous cost of transfer is incurred on each occasion; but were the cost of transfer reduced to a nominal amount, land would be constantly bought on the speculation of selling again, just as funds, railway shares, and other readily transferable property is bought. An incumbrancer, therefore, would have no hesitation in buying land he did not want to hold, if he saw it going too cheap, just as an incumbrancer, under similar circumstances, would now buy railway shares. But were the sale of land perfectly free, there would be no danger of its being sold at too low a price, for a class of capitalists would be immediately created like

stockbrokers, who would make it their business to attend all sales of land, and try to make a profit by buying to sell again. The competition of these parties would always secure for the seller the fair market price for his land."

The idea is further developed in a subsequent paper,—

"I proceed to point out the means by which the purposes of entails and foundations can be substantially secured, without any insuperable obstacle to the free transfer of land. The means to which I refer is by the adoption and extension of a principle already well known in our law, namely, the power of sale and exchange thus described in one of our law text-books (*Cruise's Digest*): 'These powers are usually inserted in settlements of real estates in England, whether by deed or will, for the purpose of effecting those improvements of the settled property which would not otherwise be attained on account of the partial interests of the tenants for life, and the suspense or minority of the objects who may ultimately become entitled under the limitations. They are given in various forms—sometimes to the trustees with the consent of the tenants for life, sometimes to the tenants for life with the consent of the trustees, at others to the trustees with the consent of the tenants for life, and after their death at the discretion of the trustees,' &c. Now this principle might be extended to all settlements and foundations, by enactments creating a complete power of sale and exchange in every settlement, leaving it to the parties to determine the person or persons to exercise the power; but in the absence of such provision, conferring the power on the protector of the settlement created by the *Fines and Recoveries Act*, or on some person or persons defined in the enactment in the same way as the protector is defined; the persons exercising the power being subject to the conditions of selling at the public sales already suggested, after having given previous notice, and of the purchase money being lodged in the Court of Chancery, subject to the same limitations and trusts as the land. Such an enactment would completely remove the restrictions upon alienation, without impairing in the slightest degree the real interests of the parties for whose benefit entails and foundations are maintained. The chief object of entails is to maintain a wealthy and hereditary aristocracy, and it is upon its wealth much more than its connection with land that the aristocracy must in future rest its power. Freedom of sale, by enabling the wealth of the aristocracy, whether in land or money, to be readily transferred, would enable it at all times to be most productively employed, and so secure its increase. Besides,



nothing can be more injurious to the ultimate stability of the aristocracy, than the continuance of any restriction like that on the transfer of land, which, without adding anything to their wealth or power, can be clearly shown to stand in the way of the welfare of large classes of the community, and indeed of national wealth and advancement."

The agricultural interest is said to entertain some fears now the duty on corn is to be entirely abolished. Let *them*, then, *insist* on having all restrictions taken off *their* raw material—the *land*, without which they cannot freely produce their *manufacture*.

Mr. Hancock also touches on other subjects which have frequently engaged our attention; first, as to Stamps, he says, —

"The second objection to stamps on searches and conveyances is, that they are as burdensome as they are unequal; for they stop the exchanges which are most beneficial to the community. I put this argument in its most general form in my last paper: I shall now support it by the opinions of two distinguished economists. 'Why,' asks M. Say, 'does an individual wish to sell his land? It is because he has another employment in view, in which his funds will be more productive. Why does another wish to purchase this same land? It is to employ a capital which produces too little, which was unemployed, or the use of which he thinks susceptible of improvement. This exchange will increase the general income, since it increases the income of these parties. But if the charges are so exorbitant as to prevent the exchange, they are an obstacle to the increase of the general income.' Again, Mr. Mill, in his new work on the 'Principles of Political Economy,' says: 'All taxes must be condemned which throw obstacles in the way of the sale of land or other instruments of production; such sales tend naturally to render the property more productive. The seller, whether moved by necessity or choice, is probably some one who is either without the means or without the capacity to make the most advantageous use of the property for productive purposes; while the buyer, on the other hand, is at any rate not needy, and is probably a person both inclined and able to improve the property, since, as it is worth more to such a person than to any other, he is likely to offer the highest price for it. All taxes, therefore, and all difficulties and expenses annexed to such contracts, are decidedly detrimental, especially in the case of land, the source of subsistence, and the original foundation of all wealth, on

the improvement of which, therefore, so much depends. Too great facilities cannot be given to enable land to pass into the hands, and assume the modes of aggregation or division most conducive to its productiveness. If landed properties are too large, alienation should be free, in order that they may be subdivided—if too small, in order that they may be united. All taxes on the transfer of landed property should be abolished.’”<sup>1</sup>

And next, as to the length of conveyance, —

“This arises almost entirely from the rule of sixty years’ title, and the necessity of a number of parties joining in the conveyance. If the plan already suggested for obviating the cost of transfer arising from the expense of investigating title were adopted, the length of conveyances, as far as the transfer of land is concerned, would be curtailed within reasonable limits. Any attempt of the legislature arbitrarily to abridge the length of conveyances, without simplifying the law which makes this length at present necessary, must end in doing more harm than good. There is one method, however, by which some saving might be effected, namely, by including all the usual covenants and powers in an act of parliament with appropriate names, and then giving deeds referring to these covenants and powers the same effect as if they were actually inserted therein.<sup>2</sup> And here I may notice an objection which has been urged against any changes facilitating the transfer of land, that they would destroy the legal professions. But this objection is founded on a complete misapprehension of the case, and of the results which such changes would produce; for, in the first place, the great part of the cost of transfer, instead of being beneficial to the legal profession, is really beneficial to no one. In the second place, legal assistance to some extent is likely to be always required, and as the number of sales will increase very much when the cost is diminished, the aggregate emoluments of the legal professions will most probably increase, although the amount made in each transaction will be less. But the objection admits of a more general answer, for the interest of no profession, when rightly understood, can be opposed to the interest of the community; so that even if the legal professions made less on sales, they would make more in other ways, arising from the

<sup>1</sup> See as to the indirect advantages arising from transfer of land, *ante* p. 209.

<sup>2</sup> Some general provision for enabling practitioners to charge for deeds *not* by length is absolutely necessary. We have recently seen deeds brought within the operation of 8 & 9 Vict. c. 119., simply to get the benefit of the clause which enables the taxing-master to alter the mode of remuneration.

general increase of wealth consequent on increased facility in the transfer of land."

We shall conclude with one more passage : —

"When there is free sale of land and security for the expenditure of capital, the greatest advantages accrue to the community in general. For when the sale of land is free, it has a constant tendency to get into the hands of those who can improve it most, since such parties can afford to give the highest price for it. Thus the seller gets a high price, the buyer gets an opportunity of exercising his skill, and the community gets the cheapness and abundance consequent on the improvement. In the second condition is comprised what Adam Smith has so well described as the *only* encouragement which industry requires from the hands of a government: 'The increase of the manufactures and the agriculture of Europe has arisen,' he says, 'from the fall of the feudal system, and from the establishment of a government which afforded to industry the only encouragement which it requires—some tolerable security that it shall enjoy the fruits of its own labour.' On the perfection of this security for the application of labour and capital to the work of improvement, depends the progress of a nation in prosperity and civilisation."

3. The third subject is perhaps even more important than the others, for in fact it affects them both. How shall reform either in the law of real property or in chancery procedure be satisfactorily carried unless we can first establish some better mode of drawing Acts of Parliament necessary for these purposes? Here we again find an almost universal concurrence of opinion that some other mode must be devised of carrying into effect the intentions of the legislature. Mr. Ludlow has expressed this in a pointed manner in a recent publication.<sup>1</sup> Alluding to the Joint Stock Winding-up Act, he says: —

"We have seen that the scope of the Act now before us is simply this, to modify the rules of equity procedure so as to bring joint-stock companies within their grasp, for the purposes of dissolution and winding-up. It is the carrying out, by the aid of Parliament, of those noble words of the present Lord Chancellor<sup>2</sup>, that

<sup>1</sup> The "Joint Stock Companies Winding-up Act, 1840," (11 & 12 Vict. c. 45.) with an Introduction, &c. by John Malcolm Ludlow, of Lincoln's Inn, Esq., Barrister, London, 1849. We may take this opportunity of stating our belief that this Act is working well, and that it has greatly added to the business of the Court. Facilitate procedure, and there will be no lack of work.

<sup>2</sup> 4 M. & Cr. 141. (Taylor v. Salmon.)

it is 'the duty of the Court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no remedy.' It is, shortly to speak, a new Chapter of Equity Procedure.

"But why is Parliament called upon to enact this Chapter of Procedure? Has not the Court authority to do the work already?

"Where matters are of a nature to be only adjudicated upon in a Court of Equity, what has Parliament to say to the question, whether and in what specific cases the initiatory step should be by petition, or by bill and answer? in the presence of how many parties the matter is to be decided? whether the proceedings are to take place by proposal only, or by state of facts and proposal? how they are to be advertised or served? what orders the Court may make? what authority it may delegate to the Master, its own officer? upon what conditions generally it is to grant its relief? Are these grave stretches of power, such as cannot be permitted but with the deliberate assent of Queen, Lords, and Commons, or are they merely such natural results of the jurisdiction of the Court, such necessary developements of its procedure, as Lord Bacon or Lord Nottingham would have disposed of in a page or two of general orders, — if not in a single judgment, as the increased magnitude of commercial undertakings should bring forth the occasion?

"I do not wish to be understood as asserting that all the provisions of the Act are of themselves within the scope of Equity jurisdiction. The vesting of the estate of the company in the official manager, the provisions with respect to actions at law, judgments, and conveyances, the penalties, and some of the evidence clauses, are matters partly or wholly transcending the authority of the Court, or the purpose of which could only be attained by circuitous means, but such clauses will be found to constitute only a very small proportion of the whole.

"Observe, moreover, that in addition to what I venture to consider the inherent, and as it were inalienable right of any English Court of Justice<sup>1</sup> to control and regulate its own procedure, the

<sup>1</sup> Of course, in countries where judicial procedure constitutes one uniform system, this discretion cannot be attributed to the Courts. — *Mr. Ludlow's note.*

Court of Chancery appears to have had special parliamentary sanction for so doing in the case of joint-stock companies. Clause 22. of the Act for facilitating the winding-up the affairs of joint-stock companies unable to meet their pecuniary engagements (repeated as s. 21, in the parallel Irish Act, 8 & 9 Vict. c. 98.), seems to extend beyond the title of the Act to all joint-stock companies, and to give to the Lord Chancellor, with the Master of the Rolls and the Vice Chancellors, or any two of them, power to make rules of orders for regulating the winding-up of such bodies 'with as little delay, expense, and uncertainty as possible.'

"I venture, therefore, to conclude that by far the greater part of this long Act of 128 clauses was unnecessary, and should properly have come into existence in the shape of orders of Court. Not that the discretion in matters of procedure allowed in this country to Courts of Justice is one essentially advantageous. But it is one of those checks which custom has introduced upon the otherwise overwhelming effects of the ill-distribution of public business amongst us. Between one Code of Civil Procedure, periodically revised, and two or three different systems of procedure shaped from time to time by the orders of the respective Courts, what rational man would hesitate? But the question is, whether, whilst varieties of procedure are perpetuated, the development of those various systems is to be cast upon Parliament, which never originated them, or upon the Courts themselves, for whose use or misuse they exist. Is Parliament really so copious of leisure, so greedy of work, as to assume upon itself, at the present day, functions which have been hitherto adequately performed by other bodies? In the session of 1848, with all Europe in flames, and the British Isles themselves breaking out everywhere with riots and rebellions, was it really the time to teach the Court of Chancery how to deal with a particular class of its own suitors? This indeed is but the parliamentary view, as it were, of the matter. But take the legal one. Granted still the advantages of a Code of Civil Procedure: *but let that be the work of a conseil d'état, of men specially employed on labours for which their previous experience has specially qualified them.*<sup>1</sup> The worst forum for such matters — so far as they do not trench upon political principles — is surely a House of Commons. Of what avail is the care with which the bill may have been prepared, when amendments can be thrust in

<sup>1</sup> Not, of course, as respects the *origination* of the laws, nor yet its *promulgation*, but the *framing* of it — a matter in which a political assembly should not interfere. — *Mr. Ludlow's note.*

or clauses thrust out at two o'clock of the morning by men who may have but a troublesome tongue or a tail of votes? I do not say that such has been the case in the present instance; but every draftsman of Acts of Parliament knows how often it is the case; every one has, for once at least in his life, on reading over the *Times* possibly the morning after the debate, been startled by the introduction of some "mad-bull clause," as they are technically termed, which makes nonsense of all his labour, and is subsequently fathered upon himself as the reputed author of the bill. Now, admitting that these may still be but necessary evils in the practice of Parliament, they constitute surely a more than sufficient ground for excluding that body from legislating upon a subject so peculiarly foreign to its own sphere as judicial procedure. There may be as good lawyers in the House of Commons as some of those on the Bench, but still a general order ought to be a safer piece of legislation than an Act of Parliament.

"And if we seek the reason of this legislative blunder, we shall probably find it in that fatal connexion of the highest judicial functions with a ministerial office, which so often distracts a first-rate Judge from the Court of Chancery, or wearies a good leader of the Lords by morning sittings at Lincoln's Inn. If we had a Minister of Justice — or, to avoid false pretences, say of law — it would be his business to see that the (legal) Lord Chancellor and his subordinate Judges did all the *work* that fell within their attributions, without burdening Parliament with new functions. At present, when the Lord Chancellor is just as much overworked as the Parliament itself, how can we expect any rational apportionment of labour between Parliament and the Courts?

"But another objection now arises. Here is an Act which provides that in the case of joint-stock companies a dissolution and winding-up may be granted on the petition of any contributory; that the winding-up may be referred to the Master, to be carried on under his orders by an official manager, in whom all the estate of the company shall be vested; and that the jurisdiction of the Master shall be *prima facie* conclusive, subject to appeal. Now, if, in matters of such magnitude and intricacy as the winding-up of a joint-stock company and the adjusting of all the claims of members upon one another, substantial justice is to be had by a scheme of this nature, why is it not applied to other matters? If a petition is to be the sufficient foundation for a suit to which hundreds of persons are parties, why are other suitors to be taxed for the cumbrous machinery of bill and answer? If it be proper

to vest the property of a joint-stock company to the amount of thousands of pounds, in an official manager, with power to institute actions and suits, and in every respect to represent the company, what danger is there in adopting the same method not only with respect to common partnerships, but to all administrations of estates by the Court? If the Master can be trusted to make a call of ten pounds per share on 500 persons, without confirmation by the Court, why is he unfit to call upon a single purchaser for the payment of his purchase money without such confirmation?

“Either all these innovations are dangerous, or they are advantageous. If they are dangerous, why was the act passed? If they are advantageous, do they not convict almost the whole machinery of the Court of Chancery of cumbrousness and extortion? Do they call for anything short of a sweeping and radical reform of its procedure?

“But it is an experiment, I shall be told. An experiment!—true, but one that is tried in matters of such consequence that failure would be ruinous. No other suit can ever involve so large an amount of property, questions so nice and so various, as the winding up of a large joint-stock company with unlimited liability. It cannot be supposed for a moment that the Lord Chancellor would ever have allowed such an act to pass without the strongest conviction of its advantages. It may therefore be reasonably assumed, that the experiment, such as it is, is expected to succeed; that, succeeding, it must entail analogous reforms of every other branch of Chancery procedure: and then, I ask, how is this to be done? Is Parliament to be called upon to regulate, by successive statutes, the new frame of an administration, of a partition suit, &c., the specific powers of the Master in cases of account and fraud, of discovery or injunction, each act repeating perhaps two-thirds of any former one, for the sake of enacting a third of new or altered matter, such as on a review of the whole subject would probably not take up more than a few lines?

“One last observation occurs. Assuming that it were necessary to provide, by act of parliament, the special procedure of a dissolution suit in equity, have the best means been taken towards attaining that end? On this point, indeed, I do not feel myself entitled to speak at length. Without contesting the strength of the reasons which may be urged in favour of the detailed method of drawing, I do not, I own, feel convinced that the procedure of a dissolution suit requires to be set forth in nearly twenty-two large folio pages, making much more than a third of the whole

French code of civil procedure. I am convinced that the chances of error always increase with the space over which they are spread, so that an act of 128 clauses affords certainly a wider field for doubt and litigation than if they could be compressed into 40. I fear that, if the act were carefully scrutinised, it would be found to err repeatedly, in the enacting of powers which already exist, and of provisions which are already in force, as well as in the enacting of powers and provisions which are logically implied in those previously contained in the act. And yet, even in those passages of the act where the careless reader would see but useless verbiage, the practised eye will discern that the most anxious care has been taken to provide for every possible contingency, to make every thing plain and easy for those who will have the working of the act: and, if the result shall fall far short of the pains taken to secure it, I fear that the causes of failure will be found to be other than intellectual. I believe that much of the verbiage in modern acts of parliament, arises in fact from a want of confidence between man and man; from a blind feeling of uncertainty whether the courts and their officers, whether the counsel or the attornies, will take the pains honestly to work out any given measure to the best advantage of the public, or are likely to be capable of doing so. Hence it is that legislation must be brought down to the level of the meanest capacity, that there is no hope of success so long as any loop-hole is left for stupidity, or perverse ingenuity, or indolence still more perverse, to stumble or crawl through.

“Yet partial success is all that such a system can look for. It is in vain to attempt to foresee every difficulty; and the endeavour to provide for special cases, instead of relying upon general rules, must be fruitful in omissions.”

Although perhaps a little overstated, there is much truth and good sense in all this. Some other legislative machine has become now absolutely necessary. Parliament may enact principles; but, as we all know, any act of Parliament worth having must be settled out of Parliament. The evil is admitted. We have a remedy suggested by an active-minded contemporary:—

“There is but one method by which Parliament can hope to make any way against the swelling tide,—and that is to simplify the process of legislation. Law reforms are not usually questions of principle, but of detail only; they are not to be settled in debate, but in committee; nor even in a committee of the whole



House, but by a select committee, in a small room, talking across a table. To such a tribunal they should be intrusted. Either House of Parliament should appoint a select committee at the commencement of each session, for the especial purpose of law reform, to whom all projects should be submitted for revision, and on their report it should be accepted, with a single debate and division, taken upon the principle only, or the question of its desirableness, leaving its details, if approved, to the scrutiny of the committee. This would enable Parliament to master at least five fold its present amount of law reform, and probably to keep pace with its progress, if not to despatch accumulated arrears.

"But even a better plan than this, if Parliament could be induced to part with so much of its power, would be for it to look to the Law Amendment Society for help, and, practically constituting it its select committee, *accept from its hands such measures as it may suggest, with no other interference than one debate in each House upon the general question of the propriety of the proposed alteration, leaving the method of doing it to the Society, sending back to it, for systematic amendment, every bill in which an alteration of the design has been determined. Thus would all law reforms be brought as nearly to perfection as possible; for,*

"First, they would be suggested by a society of practical lawyers, and prepared by them.

"Second, they would be reviewed by both Houses of Parliament with the single consideration whether they are desirable for the public, and if the general plan proposed be good.

"Third, whatever amendments are made would be referred back to the framers of the measure, to be introduced in a shape consistent with the whole measure, so that the contradictions and impracticabilities now produced by alterations in Committee would be avoided."<sup>1</sup>

We are not, with all our respect for the Law Amendment Society, quite prepared as yet for investing it with powers for superseding both Houses of Parliament; but we have thought it right to give the proposal, to show how much the necessity of the case is felt. And who will say that at some future time some similar idea may not be entertained? At present, supposing Parliament to be inclined to give up its jurisdiction, we entertain some doubt whether the Society would be quite ready and willing to assume it.

A committee was appointed last session by the House of

<sup>1</sup> Law Times, 9th Dec. 1846.

Commons, to "consider the best means of promoting the dispatch of public business." They made many useful suggestions, but we are satisfied that if a Board were appointed for revising bills, and some application of the *Cloture* Remedy (which was first, as we believe, brought forward in this Review,)<sup>1</sup> was forthwith adopted by the House, that at least half the evils that now exist would be remedied.

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The desire for some union of the Inns of Court into a Law University appears to us to increase and to receive accessions of strength from unexpected quarters. It would seem that the attorneys consider themselves aggrieved at being excluded from the Inns of Court, to which they were formerly admitted. We have long been of opinion that further measures for the legal education of all classes of the profession were not only necessary for itself, but essential to preserve the due respect and proper consideration of the public; and we shall be glad indeed if this movement on the part of so many influential persons shall create so great a pressure from without as to lead to the necessary changes from within.

Codifications of the Criminal Law and the Law of Bankruptcy will, we believe, be introduced by Lord Brougham in the House of Lords at an early period of the Session, and it may be reasonably expected that both will become the law of the land.

A new Commission has been appointed to consider the subject of Church Leases and some other questions relating to Ecclesiastical Property. The Commissioners are, the Earl of Harrowby, the Dean of Canterbury, Mr. J. S. Lefevre, Rev. R. Jones, Mr. W. P. Wood, and Mr. R. B. Armstrong.

Mr. C. Pearson has called public attention, during the last month, to the great subject of Prison Discipline, by a series of lectures and discussions, the last of which takes place to-night. We anticipate results of much importance from this very interesting investigation.

The subject of "law reporting and the mode of publication of law works" has been referred by the Law Amendment Society to a Special Committee (see *post*, 446.). We rejoice that this step has been taken, and we trust that the co-operation of all ranks of the profession may be secured to remedy the evils of the present system, which have been repeatedly exposed.

*Hilary Term, Jan. 29. 1849.*

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## NOTE TO ART. VI.

### *On French Jurisprudence.*

It must on no account be supposed that we have nothing to say against the rest of the new Constitution of France, because our article is confined to its sins against all principle as well as all common honesty in regard to the all-important

subject of the judicial system. We believe that as Lord Brougham predicted, little or no attention has been paid to the Constituent Mob's labours; and now they are over, no one troubles himself about the merits of so purely experimental a work. It is matchless, in the absurdity of its principal arrangements—whereof let one example suffice by way of sample of truly deplorable fabric. The Assembly not only is of one single chamber, against the solemn warning of the best and wisest statesmen both here and in France, but it cannot be dissolved without an act of revolutionary violence, as long as it pleases to remain, until the three years expire; so that an oligarchy is actually created deliberately, and how odious soever its whole conduct may prove to all the country, and all the rulers and magistrates, nothing but violence can get rid of it. The present collection of paupers, greedy of retaining their pound a day, has already taken the hint, and sticks to its *daily dole*, certain of never again receiving it as deputies; it resists President, parties, leaders, and a unanimous people, careless what happens, so its daily rations are retained.

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## PROCEEDINGS OF THE SOCIETY,

FOR

## PROMOTING THE AMENDMENT OF THE LAW.

[Continued from 9 L. R. 219.]

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[Permission has been obtained to insert the Proceedings and a selection of the Reports of the Society for Promoting the Amendment of the Law, but the Society is not otherwise responsible for the contents of this Review.]

GENERAL MEETING, NOV. 13. 1848. — Mr. Serjeant MANNING,  
Q. S., in the Chair.

The Minutes of the last Meeting (the 24th of July last) were read and confirmed.

The following Members were balloted for and elected:—J. Vandepont Drury, Esq., Shotover Park, Oxford; Wm. Shaen, Esq., Secretary to the Metropolitan and Provincial Law Association, 10,

Lincoln's Inn Fields; and Thomas Owen Morgan, Esq., Justice of the Peace, Barrister-at-Law, Aberystwyth, Cardiganshire.

It was resolved that a Committee be appointed "To consider the Law of Partnership, more especially with reference to the liabilities of Partners in Joint Stock Banks and other undertakings."

To consist of the following Members and all others willing to attend: — Mr. M. D. Hill, Q. C.; Mr. Headlam, M. P.; Mr. Commissioner Fane; Mr. Alderman Salomans; Mr. James Stewart; Mr. Symonds; Mr. Vansittart Neale; Dr. Shelton Mackenzie, and Mr. Thomas Henry Farrer.

The Report of the Committee on Equity on the following reference was presented.

"To consider the state of the Law respecting the confinement of persons alleged to be Lunatics."

It was agreed that the Report should be printed and further considered at the next Meeting.

[GENERAL MEETING, DEC. 11. 1848. — M. D. HILL, Esq., Q. C.,  
in the Chair.

The Minutes of the last Meeting (the 13th of Nov. last), were read and confirmed.

Charles Okey, Esq., Consul to the British Embassy at Paris, was elected a Corresponding Member.

The Report of the Committee on Equity on the following references was further considered.

"To consider the state of the Law respecting the confinement of persons alleged to be Lunatics."

It was agreed that the Report should be taken into further consideration at a Special Meeting to be held on Thursday the 21st instant, at Eight o'clock in the evening precisely.

Adjourned accordingly.

GENERAL MEETING, DEC. 21. 1848. — Mr. Serjeant MANNING,  
Q. S., in the Chair.

The Minutes of the last Meeting were read and confirmed.

The Report of the Committee on Equity on the Law relating to the confinement of persons alleged to be Lunatics was further considered.

It was agreed that the Report should be referred back to the Committee to reconsider the same, and make such amendments as they might think necessary.

Adjourned till Monday the 8th day of January, 1849, at eight o'clock in the evening precisely.

**GENERAL MEETING, JAN. 8. 1849. — Mr. Commissioner  
FANE in the Chair.**

The Minutes of the last Meeting (the 21st of Dec. last) were read and confirmed.

The following Members were balloted for and elected: — Thomas Alcock, Esq., M.P., Kingswood, near Epsom; Henry Toogood, Esq., Solicitor, 22, Parliament Street; William Jaffray, Esq., 3, New Inn; William Pearson, Esq., Poplar Cottage, Shepherd's Bush; Charles Twamley, Esq., Clerk to the Lambeth County Court, Denmark Hill, Camberwell.

The Report of the Committee on Equity, on the following reference, "To consider the state of the Law respecting the confinement of persons alleged to be Lunatics." was received.

It was resolved that a Committee be appointed, "To consider what improvements, if any, may be made in the present system of Law Reporting, and generally on the mode of publication of Law Works."

To consist of the following Members, and all others willing to attend: — Mr. Ewart, M.P.; Mr. Serjeant Manning, Q. S., Mr. M. D. Hill, Q. C.; Mr. William David Lewis; Professor Creasy; Mr. James Stewart; Mr. Arthur Symonds; Mr. Harris Prendergast; Mr. E. Vansittart Neale; Mr. Woolrich; and Mr. Alexander Pulling.

The further Report of the Committee on Equity on the following reference was presented: — "That the Committee be requested to direct their valuable labours to the consideration of whether any further Alterations can be made in the whole system of the jurisdiction, practice, and constitution of the Masters and Masters' Offices, with a view to obtain a more speedy and cheaper administration of justice in the Court of Chancery."

It was agreed that the Report should be printed and further considered at the next meeting.

**NOTICES FOR MONDAY, THE 12th OF FEBRUARY.**

I. The Report of the Committee on Equity relating to the Masters' Offices will be further considered.

**NOTICE OF MOTION.**

Proposed Resolutions of which notice was given at the last Meeting.

1. That this Report be received.
- 2; That the evils attending the procedure of the Court of Chancery are not only denounced by the suitors who suffer from them,

but are fully admitted by the Judges, the Masters, and other Officers of the Courts.

3. That it has been proved before a Select Committee of the House of Commons that under such procedure, delay and expense are most grievous, that the suitor is seldom able to obtain his just rights for years, and sometimes his whole property is consumed in unnecessary costs.

4. That this society, whilst asserting the necessity of extensive changes in such procedure, is of opinion that as such changes will affect the administration of millions of property by the first tribunal in the country, it is of great importance not to abolish any part of the existing machinery before any plan that may be adopted shall have had a fair trial, and be found to work well in practice.

5. That the number of the Judges and Officers of the Court of Chancery will easily permit the trial of a new procedure, by way of option to the suitor, without superseding the present machinery.

6. That this Society is of opinion that the greater part of the delay and expense now attending a suit in Chancery arises from its being adjudicated upon by two judicial persons, the Judge and the Master, who are not necessarily in communication with each other.

7. That if the Judge had the direct and exclusive responsibility of disposing of a suit from beginning to end, sitting in Court or in Chambers as he might think best, and availing himself of the assistance of a staff of officers similar to those now employed by a Master, this Society is of opinion that a great number of cases would be easily and speedily decided, and that months, or even days, might be substituted for the years which now frequently elapse before such suits are disposed of; and that having this object in view, the Judges of the Court should be enabled to decide points by way of special case submitted to them.

8. That if any of the present Judges of the Court of Chancery were willing to undertake the whole conduct and disposal of a cause on this principle, a fair trial might be given to the plan, without further superseding the present machinery of the Court of Chancery.

9. That this Society is of opinion that a more effectual machinery for taking accounts by professional accountants, and for disposing of the administrative business of the Court might be adopted.

10. That the whole fee system of the Court of Chancery requires revision and regulation.

11. That the great bulk of the fees now paid in the Court of

Chancery fall on contentious suits, that is, on suits in which the rights of the parties are in litigation, while suits of an administrative character, that is, suits in which property is kept in safe custody, and properly distributed by the Court, are comparatively highly taxed.

12. That a small percentage should be levied on all payments made by the Accountant-General of the monies administered by him, which percentage should form a primary fund, to be applicable to the payment of the judicial establishment of the Court; and any deficiency therein should be raisable by fees payable by the suitors, in contentious matters before the Court.

13. That it would be highly desirable to relieve, as far as possible, contentious suits from the payment of such fees, and to place them in suits of an administrative character; and it would appear that of a small *ad valorem* fee were levied on the property paid and distributed by means of the Court of Chancery, the suitor most entitled to consideration would be materially relieved from the fees which he is now obliged to pay, and the burden placed on the class of suitors most able to bear it.

14. That a certain number of district agents or receivers should be appointed by the Lord Chancellor; among whom, according to the necessities of the case, should be apportioned the real estates under the management of the Court of Chancery.

15. That the business should be so apportioned as to secure the services of experienced land agents.

16. That these Receivers should render their accounts to one common head or department, which should be authorised to issue regulations on this subject, and to allow disbursements for the benefit of the lands under its care.

17. That to this department should be also intrusted the sale of estates directed to be sold by the Court.

18. That a sufficient number of official assignees should be appointed by the Lord Chancellor, who should, on the motion of one or more of the parties to the suit, or at the discretion of the Court, be attached to the cause where their services were required.

19. That the experience of the Court of Bankruptcy in matters analogous to much of the business of the Court of Chancery, justifies the adoption of the machinery here proposed.

II. The Report of the Committee appointed—"To consider the Law of Partnership, more especially with reference to the liabilities of Partners in Joint Stock Banks and other undertakings."

And also two Papers upon the Subject, directed to be read to the Society by the Committee, will be presented.

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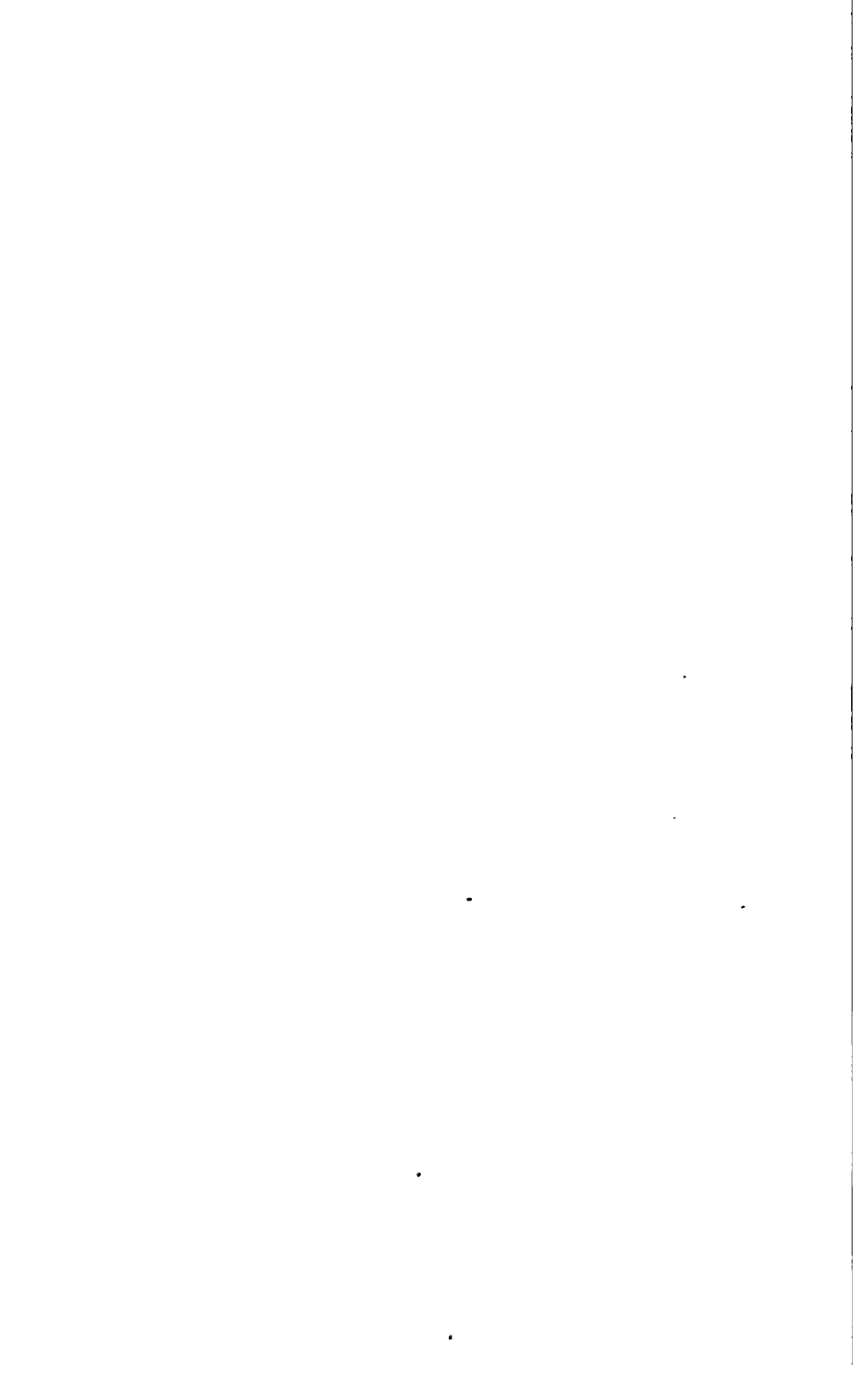
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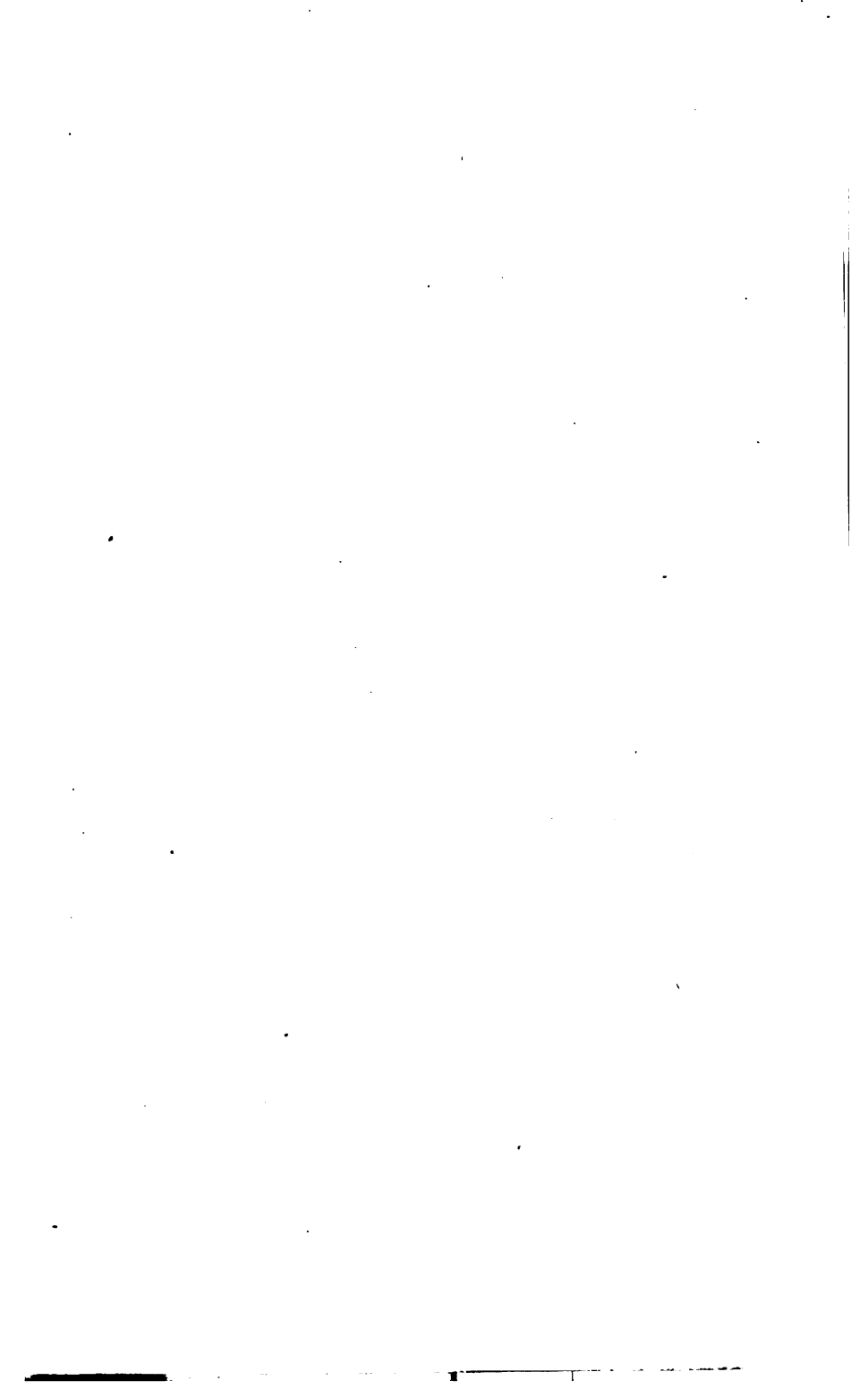
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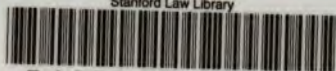








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